SUPREME COURT, U.S.
FILED
JAN 15 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1951.

669 31

Miscellaneous Docket No. 300.

UNITED STATES OF AMERICA ex rel. JAMES SMITH,
Petitioner,

v.

DR. FREDERICK S. BALDI, Superintendent,
Philadelphia County Prison.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, BRIEF AND AFFIDAVIT OF COUNSEL.

HERBERT S. LEVIN,
THOMAS D. McBRIDE,
1529 Walnut Street,
Philadelphia 2, Pa.,
Counsel for Petitioner.

International, 236 Chestnut St., Phila. 6, Pa.

INDEX TO PETITION.

	Page
I. Summary Statement of the Matter Involved	1
A. Petitioner Was Arraigned in a Capital Case Without Counsel. He Pleaded "Not Guilty" But Was Harmed Anyway, Because He Thereby Lost His Only Chance to Have His Mental Competency Tried in Limine by a Jury	5
B. Under the Circumstances of This Case There Could Be No Effective Assistance of Counsel Without Adding Thereto the Right to Employ Psychiatric Assistance at the Expense of the Commonwealth	7
C. The Plea of Guilty Was Void. At a Hearing on Such Plea the Court Is Without Authority to Adjudicate Mental Competency	9
D. The Trial Court Adjudicated the Degree of Petitioner's Crime to Be Murder of the First Degree After Hearing the Prosecution's Evidence Only and Refused to Hear His Evidence on That Question	10
E. The Trial Court Not Only Was Without Jurisdiction on Guilty Plea to Adjudicate Mental Competency to Plead But Never Heard or Acted on Relevant Evidence on This Issue. The M'Naghten Formula Has Nothing to Do With This Issue. Besides, That Formula Is Now Outmoded and Is Not a Sufficient Basis Upon Which Even to Decide the Entirely Separate Question of Responsibility for Crime	11

INDEX TO PETITION (Continued).

Page

F. The Supreme Court of Pennsylvania Not Only Failed to Redress Violation of Petitioner's Constitutional Rights by the Trial Court But Itself Denied Such Rights by Refusing to Hear and Adjudicate the Petition for Writ of Habeas Corpus 12

G. The District Court Should Have Heard the Petition 13

II. Basis of Jurisdiction 13

III. Questions Presented 14

IV. Reasons Relied on for the Allowance of the Writ 16

Supplemental Appendix to Petition—Affidavit of Counsel 21

TABLE OF CASES CITED.

	Page
Ashley v. Pescor, 147 F. 2d 318	16
Commonwealth v. Smith, Philadelphia, Oyer and Terminer, Opinion Filed March 4, 1949 (Unreported), Aff'd 362 Pa. 222, 66 A. 2d 764 (1949)	1, 14
Commonwealth ex rel. Smith v. Ashe, 364 Pa. 93, 71 A. 2d 107 (1950), cert. den. 340 U. S. 812 (1950)	3, 14
Commonwealth ex rel. Smith v. Warden, Philadelphia County Prison, et al., 87 F. Supp. 339, aff'd 181 F. 2d 847	2, 3
Phyle v. Duffy, 334 U. S. 431	16
Sofesbee v. Balkcom, 339 U. S. 9	17
Youtsey v. United States (6th Cir.), 97 F. 937	16

STATUTE CITED.

	Page
Code of Judiciary and Judicial Procedure, Section 1254(1), 28 U. S. C. A. 1254(1)	13
U. S. Constitution:	
Fifth Amendment	13, 15
Fourteenth Amendment	13, 14, 15, 16

INDEX TO BRIEF.

	Page
Summary of Argument	25
General Statement	26
Petitioner Was Overreached at Arraignment	30
(a) In Capital Cases Prejudice Is Presumed to Result from Denial of a Constitutional Right	32
(b) Petitioner in Fact Was Fatally Prejudiced	35
The State Denied "Effective Assistance" of Counsel When Under the Facts of This Case It Denied the Requests for Appointment of a Psychiatrist to Aid the Appointed Lawyer	44
The Trial Court Was Without Authority to Accept the Guilty Plea	48
The Trial Court Adjudicated the Degree of Petitioner's Crime to Be Murder of the First Degree After Hearing the Prosecution's Evidence Only and Refused to Hear His Evidence on That Question	51
The Trial Court Did Not Adjudicate Mental Competency or Receive Relevant Evidence on That Issue	60
The Supreme Court of Pennsylvania Not Only Failed to Correct the Denial of Procedural Due Process by the Trial Court in the Main Trial, But Itself Denied Procedural Due Process in This Proceeding. It Did Not Adjudicate Petitioner's Claim of Deprivation of Federal Rights	63
The District Court Should Have Heard the Petition	68
Conclusion	70

TABLE OF CASES CITED.

	Page
Ashley v. Pescor, 147 F. 2d 318	29
Bonds v. State, Mart. & Y. 143	28
Bowen v. Johnston, 306 U. S. 19, 23, 24, 59 S. Ct. 442	64
Bute v. Illinois, 333 U. S. 640	33, 34
Carter v. Illinois, 329 U. S. 173, 91 L. ed. 172, 67 S. Ct. 216	31
Carter v. State, 198 Miss. 523, 21 So. 2d 404	29
Chase-Hibbard M. Co. v. City of Elmira, 207 N. Y. 455	30
Chase-Hibbard M. Co. v. City of New York, 64 N. Y. S. 681, 31 Misc. 559	63
Cochran v. Kansas, 316 U. S. 255, 62 S. Ct. 1068	64
Commonwealth v. Barnes, 280 Pa. 351, 124 A. 636	38, 40, 42
Commonwealth v. Barrish, 297 Pa. 160, 146 A. 553	52
Commonwealth v. Cilione, 293 Pa. 208	29
Commonwealth v. Dunn, 47 D. & C. 685	40, 42
Commonwealth v. Endrukat, 231 Pa. 529	29
Commonwealth v. Green, 346 Pa. 172	40, 42, 46
Commonwealth v. Heston, 292 Pa. 63, 140 A. 533	63
Commonwealth v. Iacobino, 319 Pa. 65, 178 A. 823	37, 46, 51
Commonwealth v. Ragone, 317 Pa. 113	28, 29
Commonwealth v. Scovern, 292 Pa. 26	29, 50, 61
Commonwealth v. Senauskas, 326 Pa. 69	49
Commonwealth v. Simanowicz, 242 Pa. 402	37
Commonwealth ex rel. McGlynn v. Smith, 344 Pa. 41, 47, 24 A. 2d 1	64
Commonwealth ex rel. Milewski v. Ashe, 362 Pa. 48, 66 A. 2d 281	64
Commonwealth ex rel. Piccirelli v. Smith, 150 Pa. Super. 105	64

TABLE OF CASES CITED (Continued).

Page

Commonwealth ex rel. Townsend v. Burke, 361 Pa. 35, 63 A. 2d 77 ..... 33, 64
Crocker v. State, 60 Wis. 556, 19 N. W. 435 28
Deeb v. State, 118 Fla. 88, 158 So. 80 29
DeMeerleer v. Michigan, 329 U. S. 663, 91 L. ed. 584, 67 S. Ct. 596 31
Evans v. Rives, 126 F. 2d 633 32
Fortheffer v. Swope, 103 F. 2d 707 27
Foster v. Illinois, 332 U. S. 134 33
Frame v. Hudspeth, 309 U. S. 632, 60 S. Ct. 712 44
Frank v. Mangum, 237 U. S. 309 69
Freeman v. People, 4 Denio, 9 28
Frith's Case, 22 How. St. Tr. 307 28
Genzer v. Fillips, 134 S. W. 2d 730 ..... 30, 63
Glasser v. United States, 315 U. S. 60, 62 S. Ct. 457 33
Guagando v. State, 41 Tex. 626 29
Hawk v. Olson, 326 U. S. 271 ..... 27, 28, 31, 32, 69
Honaker v. Cox, 51 F. Supp 829 44
Johnson v. Zerbst, 304 U. S. 458 27
Lisenba v. California, 314 U. S. 219 69
Louisiana v. Resweber, 329 U. S. 459 69
McGarty v. O'Brien, 188 F. 2d 151 ..... 45, 46, 48
Moore v. Dempsey, 261 U. S. 86, 67 L. ed. 543, 43 S. Ct. 265 31
Nanty-Glo Boro v. American Surety Co., 309 Pa. 236 52
Nobles v. Georgia, 168 U. S. 398 29
Norford v. State, 116 Tex. Cr. Rep. 533, 34 S. W. 2d 290 29
People v. Nierstheimer, 401 Ill. 260, 81 N. E. 2d 900 .. 29
Phyle v. Duffy, 334 U. S. 431 29

TABLE OF CASES CITED (Continued).

	Page
Powell v. Alabama, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55, 84 ALR 527	31, 32, 33
Pyle v. Kansas, 317 U. S. 213, 63 S. Ct. 177	64
Reel v. Elder, 62 Pa. 308	52
Rex v. Pritchard, 7 Car. & P. 303	28
Rice v. Olson, 324 U. S. 786, 65 S. Ct. 989	64
Robinson v. Johnston, 50 F. Supp. 774	32, 44
Sapp v. City of New York, 64 N. Y. S. 681, 31 Misc. 559	30
Signs v. State, 35 Okl. Cr. 340, 250 P. 938	29
Snyder v. Massachusetts, 291 U. S. 97	51
Solesbee v. Balkcom, 339 U. S. 9	26, 29
State v. David, 6 Wash. 2d 696, 108 P. 2d 641	29
State v. Detar, 125 Kansas 218, 263 P. 1071	29
State v. Huhn, 346 Mo. 695, 142 S. W. 2d 1064	30, 63
State v. Reed, 41 La. Ann. 581, 7 South. 132	29
Taffe v. State, 23 Ark. 34	28
Tomkins v. Missouri, 323 U. S. 485, 89 L. ed. 407, 65 S. Ct. 370	28, 31
Townsend v. Penna., 334 U. S. 736	33, 34, 36
Underwood v. People, 32 Mich. 1	29
United States v. Harriman, 4 F. Supp. 186	29
United States v. Venuto, 182 F. 2d 519	33
United States ex rel. Mazy v. Ragen, 149 F. 2d 948	29
Walker v. Johnston, 312 U. S. 275, 61 S. Ct. 574	64
Webber v. Commonwealth, 119 Pa. 223	29, 35
White v. Ragen, 324 U. S. 760, 89 L. ed. 932, 65 S. Ct. 978	27, 69
Williams v. Kaiser, 323 U. S. 471, 89 L. ed. 398, 65 S. Ct. 363	28, 31, 33
Williamson v. Lewis, 39 Pa. 9	63
Youtsey v. United States, 97 Fed. Rep. 937	29

TABLE OF STATUTES AND AUTHORITIES CITED.

	Page
Act of March 31, 1860, P. L. 427, Section 67	37
Act of March 22, 1907, P. L. 31, Section 1, as Amended, 19 P. S. 784	30
Act of June 24, 1939, P. L. 872, Section 701, 18 P. S. 4701	50
2 Bish. Cr. Proc. Sec. 666	28
4 Bl. Com. 24, 25	28
4 Bl. Com. 483	51
Briggs Law, Mass. G. L. (Ter. Ed.) c. 123, Section 100A, as Amended by St. 1941, c. 194, Section 11	45
Constitution of Pennsylvania, Art. V, Sec. 3	63
6 Co. 52	51
1 Hale P. C. 34	28
Pennsylvania Mental Health Act of July 11, 1923, P. L. 998, 50 Purdon Statutes 1, et seq.	38, 41, 42
U. S. Constitution:	
Fifth Amendment	26
Fourteenth Amendment	25, 26, 28, 31, 32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

Miscellaneous Docket No. 300.

UNITED STATES OF AMERICA EX REL.
JAMES SMITH,
Petitioner,

v.

DR. FREDERICK S. BALDI, SUPERINTENDENT,
PHILADELPHIA COUNTY PRISON.

PETTTION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of James Smith, respectfully represents:

I. SUMMARY STATEMENT OF THE MATTER INVOLVED.

On February 18, 1948, petitioner was indicted for murder in the Court of Oyer and Terminer, Philadelphia County, under No. 384, February Term, 1948, and was ultimately sentenced to death in the electric chair on the theory that he committed a murder in the attempt to perpetrate a robbery.

After his sentence on February 4, 1949, petitioner appealed to the Supreme Court of Pennsylvania, which affirmed the sentence of death. *Commonwealth v. Smith*, 362 Pa. 222, 66 A. 2d 764.

At that time, he did not petition this Court for a writ of certiorari to review the affirmance of his sentence. An application for executive clemency was made to the Pennsylvania Board of Pardons which was rejected September 21, 1949.

Two days later, petitioner filed his petition for writ of habeas corpus with one of the judges of the United States District Court for the Eastern District of Pennsylvania. That judge directed oral argument the next day upon notice to the prosecuting attorney. After oral argument, the judge issued the writ on September 24, 1949, but the petitioner meanwhile was being transported to another part of the state for execution and at the time the writ issued was beyond the territorial limits of the Eastern District of Pennsylvania.

The full court of five judges assembled at the request of the judge who issued the writ and petitioner was directed to orally argue three questions: (a) territorial jurisdiction; (b) exhaustion of state remedies; (c) sufficiency of the petition. After oral argument the court directed that testimony be taken before the judge who had issued the writ. Such testimony was taken.

Thereafter a majority of the court dismissed the petition on the sole ground that the court lacked territorial jurisdiction. One of the majority also expressed the view that state remedies had not been exhausted. The judge who had issued the writ and heard the testimony dissented and held that the court did have jurisdiction, that under the special circumstances of the case there had been sufficient exhaustion of state remedies, and that he was convinced by the testimony taken before him that petitioner's federal constitutional right to procedural due process had been violated.

No findings of fact were made by the court except those stated in the opinion of the judge who heard the testimony. The three separate opinions are reported at *Commonwealth ex rel. Smith v. Warden, Philadelphia County Prison, et al.*,

87 F. Supp. 339. The action of the District Court was affirmed on appeal to the Court of Appeals at 181 F. 2d 847, on the sole ground that at the time the writ issued the District Court was without territorial jurisdiction.

Since the Commonwealth contended in these proceedings that petitioner had not exhausted "state" remedies, he filed on November 21, 1949, an original petition in the State Supreme Court. The grounds were broader than those stated in the original petition to the United States District Court. The State Supreme Court, upon examination of the petition and an oral statement which counsel was directed to make in open court, found that on its face the petition recited facts which, if true, warranted relief and on November 23, 1949, granted a rule to show cause why a writ of habeas corpus should not issue (Supplemental Appendix for Appellant, p. 1).

The State Supreme Court, however, refused to afford petitioner an opportunity to prove his allegations. In some unofficial way, still unknown to counsel for petitioner, the opinion writer got hold of a copy of the testimony previously taken in the United States District Court (see Supplemental Appendix for Appellant, pp. 54-55).

The State Supreme Court made no findings of fact, nor did it refer the case to any Pennsylvania tribunal to hear evidence and to make findings of fact as requested by petitioner, but instead, the opinion writer stated conclusions as having been drawn from that testimony which were not only contrary to the petition before the court but also to the testimony of petitioner's witnesses and the inferences drawn by the United States District Court Judge who heard those witnesses. The State Supreme Court simply dismissed the petition in a long opinion without really adjudicating it. *See Commonwealth ex rel. Smith v. Ashe*, 364 Pa. 93, 71 A. 2d 107. This action was called to the attention of this Court upon petition for writ of certiorari at No. 818, October Term, 1949. This Court refused certiorari. 340 U. S. 812.

Petitioner, who was then back in the Philadelphia County Prison, within the territorial jurisdiction of the Eastern District of Pennsylvania, submitted a new petition to the District Court alleging deprivation of rights under the Fourteenth Amendment on substantially the same grounds as previously urged in the Supreme Court of Pennsylvania. Upon inspection of the petition, the same judge of the District Court who had previously heard the testimony determined that it showed a prima facie case and granted a rule to show cause why a writ of habeas corpus should not be granted and *sua sponte* the judges of the District Court (now seven in number) assembled the full court. A majority of the court ultimately refused to issue the writ or to permit petitioner to prove the truth of his averments, but by this time petitioner was gaining strength. The Opinion of the Court and the Dissenting Opinion (4 to 3) are reported at 96 F. Supp. 100. By what it called "a valid exercise of sound judicial discretion" the majority dismissed the petition without hearing evidence. The minority (which included the judge who had granted the rule) dissented on the ground that a hearing should be held.

Upon appeal the seven judges of the Court of Appeals for the Third Circuit *sua sponte* assembled the full court. Again the petitioner almost won. The Opinion of the Court affirming the judgment and the Dissenting Opinion (4 to 3) accompany this petition. The Court of Appeals stayed the execution of petitioner pending disposition of this petition.

The majority opinion of four judges of the Court of Appeals holds that state remedies having been exhausted, the District Court had jurisdiction, that it did not have the discretion it claimed but that the petition did not demonstrate a deprivation of federal constitutional rights and hence its decision should be affirmed. The Dissenting Opinion of the three judges agree on jurisdiction and exhaustion of state remedies but state unequivocally that the Petition and records of the case make a substantial showing that Pennsylvania denied petitioner procedural due process un-

der the Fourteenth Amendment on six separate grounds and that there ought to be a hearing and finding of facts.

Petitioner has transmitted to this Court for its consideration the papers which were considered by the Court of Appeals (a) original printed record on appeal to the Supreme Court of Pennsylvania; (b) Appendix to Brief for Appellant; (c) Supplemental Appendix to Brief for Appellant; (d) Notes of Testimony taken before the judge of the United States District Court on original Habeas Corpus; (e) Appendix to Appellee's Brief.

Petitioner believes it would be helpful if instead of a general statement of facts he were to present each issue in the light of its own facts.

A. Petitioner Was Arraigned in a Capital Case Without Counsel. He Pleaded "Not Guilty" But Was Harmed Anyway Because He Thereby Lost His Only Chance to Have His Mental Competency Tried in Limine by a Jury.[1]

Petitioner is a young man with a long and well-authenticated history of insanity, including an adjudication of mental incompetency to be tried by a New York Criminal Court. Shortly after midnight on January 15, 1948, while riding as a passenger in the back seat of a slowly moving taxicab, he killed the unoffending taxicab driver by shooting him in the back of the head. Petitioner then jumped over to the front seat to bring the taxicab to a stop, dropped his pistol on the seat, got out, was apprehended at the scene and turned over to the police. The police say that although he made no attempt to take the driver's money, petitioner admitted that such had been his purpose.

The first point in the proceedings wherein Petitioner bases his claim of denial of due process was his arraignment. Petitioner, who was indigent, had been confined in

1. This point is treated in the Majority Opinion p. 6, et seq.; 192 F. 2d at 545; and in the Dissenting Opinion p. 22, et seq.; 192 F. 2d 553, et seq. Petitioner briefs the point post p. 30 et seq.

the Philadelphia County Prison after his arrest and had not retained counsel. However, on the evening of February 24, 1948, six days after indictment, a relative of Petitioner retained Herbert S. Levin, Esquire, of the Philadelphia Bar, to represent Petitioner. On the following day, without notice to Mr. Levin (who had not yet had time to enter a formal appearance) Petitioner was brought to the bar of the court and arraigned. Mr. Levin was not present.

Even though the charge was a capital one, no attempt was made to ascertain if defendant was represented by counsel. An instant before arraignment, the court directed Joseph Alessandroni, Esquire, of the Philadelphia Bar, who was in the courtroom on other business, to stand beside Petitioner. Mr. Alessandroni was not directed to do so as appointed counsel. He had nothing to do with the case either before or after the arraignment. Mr. Alessandroni did not know what Petitioner was charged with except that the offense was Murder. Mr. Alessandroni did not know in what circumstances Petitioner was alleged to have committed murder. Mr. Alessandroni had never seen Petitioner before the arraignment and never saw him thereafter. Mr. Alessandroni had no knowledge as to Petitioner's mental capacity or lack of mental capacity to be arraigned. Mr. Alessandroni was afforded no opportunity by the court to consult with Petitioner. The only thing Mr. Alessandroni said to Petitioner was that he was *not* Petitioner's counsel and that Petitioner should plead Not Guilty and prompted Petitioner to make the old common law response that he elected to be tried by "God and my country." Mr. Alessandroni did not explain the nature of the proceedings to Petitioner. (All of the above averments appear in paragraph 3 of the Petition. See Supplemental Appendix for Appellant, pp. 14-15.)

At his arraignment the judge had *power* to direct a separate *jury trial* on the issue of his mental competency to be tried on the general issue. Thereafter not only dis-

cretion to grant such jury trial was lost but power also. Other *non-jury* proceedings may have been open to him *in limine* but power in any court to grant him a jury trial *in limine* was lost. Petitioner tried the other ways which were thought to be open to him but was denied them also. The court held itself to be powerless because the warden of the prison refused to join as a party petitioner. *His mental competency to stand trial has never been determined by any court legally organized and competent to do so.*

B. Under the Circumstances of This Case There Could Be No Effective Assistance of Counsel Without Adding Thereto the Right to Employ Psychiatric Assistance at the Expense of the Commonwealth.[2]

The petition for habeas corpus in this case averred (Supplemental Appendix for Appellant, p. 9, par. 31) "It is averred that Relator's appointed counsel were deprived of and denied the means of effectively aiding Relator, both pre-trial and during the trial or hearing, in that they were refused, and unable to obtain, psychiatric aid to determine Relator's sanity, or to assist them in the cross-examination of the court appointed psychiatrist; that this is a denial of due process, in contravention of the guarantees to which Relator was entitled under the due process clause of the 14th Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution."

The petition further recited (id. p. 10, par. 34) "It is averred that the failure to furnish Relator or his court-appointed counsel with, and the denial to them of, psychiatric examination of Relator and psychiatric advice, pre-trial and during the trial or hearing, violates the rights of Relator guaranteed him by Amendments 5, 6 and 14 of the Constitution of the United States, the due process clause of the 14th Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution."

2. This point is treated in the Majority Opinion p. 10, et seq.; 192 F. 2d 546; and in the Dissenting Opinion p. 34, et seq.; 192 F.2d 559. Petitioner briefs the point post p. 44 et seq.

It clearly appears also from the pre-trial petition filed by Mr. Levin as private counsel on petitioner's behalf (Supplemental Appendix to Brief for Appellant, 62a-64a) that after setting forth the history of petitioner's mental disease, including the diagnosis of psychosis, inability to defend and commitment to the Brooklyn State Hospital, counsel specifically asked for the appointment of a commission to inquire into and to report upon the facts as to mental capacity. Furthermore, in his petition to withdraw as private counsel, the same type of mental illness was recited and also the need of preparing the defense with the aid of psychiatric testimony (see id. par. 11, 68a, 71a).

The majority of the court below assumed the *untruth* of these averments of the petition without giving petitioner an opportunity to prove them. Also, the rather bewildering opinion of the State Supreme Court (Supplemental Appendix for Appellant, p. 39) says that there was no request for a "sanity hearing" but the opinion writer had himself already pointed out that counsel requested one (p. 33) and the petitioner requested one (p. 34).

The failure to afford medical aid in the circumstances of this case [3] rendered ineffective the requisite "assistance" of counsel. Here, there could be no effective assistance without the help of a man capable of understanding mental illness. Appointment of a psychiatrist after guilty plea to inform the court as to penalty cured nothing. The psychiatrist so appointed did not inquire into the data relevant to decision and his own presently incurable psychosis casts grave doubt as to the competency of the data supplied by him upon which the court acted. (See affidavit of Counsel post, p. 21.)

---

3. A full medical history appears in the dissenting opinion of the court below pp. 38-42; 192 F. 2d at 561-563.

C. The Plea of Guilty Was Void. At a Hearing on Such Plea the Court Is Without Authority to Adjudicate Mental Competency.[4]

Petitioner, under the circumstances noted above, having not had his sanity determined *in limine* by court, jury or commission, having no money to engage medical expert opinion to testify whether he was insane either under the rule applicable to responsibility for crime as well as competency to be tried, entered a bastard type of guilty plea on September 21, 1948. The Court, prosecutor and defense counsel, with full knowledge that (a) petitioner had previously been adjudged mentally incompetent; (b) that he had been denied psychiatric examination or assistance; (c) that the formal petition for a commission in lunacy had been denied; (d) that no Pennsylvania court had passed on his mental capacity, joined in having such a guilty plea entered.

It was agreed between the court, prosecutor and counsel for defendant that the guilty plea was an "expedient" to provide breathing space for getting the records as to petitioner's mental incompetency from New York. The Commonwealth so characterized it in its original brief. Only the Commonwealth was to produce its evidence with the defense to be heard later. But, having accepted the plea, the Court held petitioner bound by it.

Petitioner avers that the Court was without power either under the common law or statute to receive such plea under such circumstances. The agreement of a defendant cannot supply the lack of fundamental power of the court which is inherent in such a situation.

The State Supreme Court held that the guilty plea relieved the trial court of the necessity of adjudicating mental competency. The majority of the court below disagrees with the State Supreme Court and concedes that petitioner

---

4. This point is treated in the Majority Opinion p. 9, 192 F. 2d 546; and in the Dissenting Opinion p. 24, et seq.; 192 F. 2d 554. Petitioner briefs the point post p. 48 et seq.

was as a matter of federal right entitled to have his mental competency determined prior to judgment but then holds that the sentencing court did adjudicate the point. It could not legally do so and it did not do so.

D. The Trial Court Adjudicated the Degree of Petitioner's Crime to be Murder of the First Degree After Hearing the Prosecution's Evidence Only and Refused to Hear His Evidence on That Question.[5]

The guilty plea, even if valid, constituted a plea to second degree murder. It became thereby the duty of three judges to hear the evidence, resolve any conflicts, find the true facts and decide the appropriate degree of the offense. The burden of proving first degree murder to the satisfaction of the judges beyond a reasonable doubt still lay on the prosecution. If the judges, after hearing all the evidence, were satisfied that it was murder in the first degree, they could impose in their discretion the penalty of life imprisonment or death by electrocution. If not so satisfied a judgment no higher than second degree could be entered.

The record of this case and the true facts demonstrate beyond any doubt that although the trial court was required to hear both sides of the case before coming to any conclusion as to the degree of petitioner's guilt of murder, it determined his guilt on September 21, 1948, as murder of the first degree not only before hearing any evidence as to his mental competency, but *before hearing even his own testimony or any other factual evidence on his behalf.* This is demonstrated (a) by the docket entries (R. 2a); (b) by the original indictment (photostatic copy attached to end of opinions of court below); (c) by the original Record on appeal in the Supreme Court (R 76a); and (d) by the Opinion of the Supreme Court affirming the judgment on the main case (362 Pa. 222, 66 A. 2d 764).

5. This point is treated in the Majority Opinion p. 12, 192 F. 2d 547; and in the Minority Opinion p. 27, 192 F. 2d at 555. Petitioner briefs the point post p. 51 et seq.

This premature action of the trial court not only violated due process; it violated the agreement that constituted the very basis upon which the guilty plea was entered. Since the judgment of first degree murder was rendered by a court which at that time was without power to render it, it is void.

E. The Trial Court Not Only Was Without Jurisdiction on Guilty Plea to Adjudicate Mental Competency to Plead But Never Heard or Acted on Relevant Evidence on This Issue. The M'Naghten Formula Has Nothing to Do With This Issue. Besides, That Formula Is Now Outmoded and Is Not a Sufficient Basis Upon Which Even to Decide the Entirely Separate Question of Responsibility for Crime.[6]

The sentencing court adjudicated petitioner's guilt to be murder of the first degree and never did receive relevant evidence on the issue of his mental competency to plead, or to be tried, or sentenced. The Court received no evidence to show whether petitioner was mentally competent *to appreciate his peril or cooperate in his defense* either on February 25, 1948, when he pleaded Not Guilty, nor on September 21, 1948, when he pleaded Guilty. Instead the court proceeded to sentence petitioner to death by applying the principle of the M'Naghten formula which *never did have any legal relevancy to the issue of mental competency to be tried.* The psychiatrist testified that he "believed" petitioner knew the difference between *right and wrong at the time of his examination* on November 4, 1948, and *at the time of the killing* on January 15, 1948 (Record in Supreme Court, p. 164a). He was never asked the relevant questions by anybody. The Court could not and did not adjudicate that burning pivotal issue.

In the light of accepted modern medical and scientific learning, the M'Naghten rule is outmoded and it is a denial

6. This point is treated in the Minority Opinion p. 37, et seq., 192 F. 2d 560. Petitioner briefs the point post p. 60 et seq.

of due process of law to permit it to be of controlling legal relevancy even in adjudging mental responsibility for crime. There is no justification at all for an attempt at this late date to set it up as a test of mental capacity to plead or be tried.

F. The Supreme Court of Pennsylvania Not Only Failed to Redress Violation of Petitioner's Constitutional Rights by the Trial Court But Itself Denied Such Rights by Refusing to Hear and Adjudicate the Petition for Writ of Habeas Corpus.[7]

Since the Supreme Court of Pennsylvania, by issuing the rule to show cause agreed that the petition presented a prima facie case, it was the duty of that court to hear and adjudicate the case. It could do this only by accepting the averments of the petition to be true or by giving petitioner an opportunity to prove them to be true. Instead, it assumed some of the pivotal averments to be untrue. The opinion writer got hold of the testimony taken before the federal court (which later held itself to be without territorial jurisdiction) and used such of the evidence as he thought comported with the court's decision, without warning or notice to petitioner that he would do so, and without giving petitioner an opportunity to prove his case before any Pennsylvania tribunal.

No findings of fact were made by the Supreme Court. Under the circumstances the Supreme Court of Pennsylvania adjudicated nothing. In any event it is the duty of a federal court, in a case properly before it on habeas corpus, to come to its independent judgment as to whether federal rights have been violated.

---

7. This point is treated in the Majority Opinion p. 14, 192 F. 2d at 548; and in the Dissenting Opinion p. 21 et seq., 192 F. 2d 552. Petitioner briefs the point post p. 63 et seq.

G. The District Could Should Have Heard the Petition.[8]

Petitioner had exhausted his state remedies. His petition made a substantial prima facie showing that the State of Pennsylvania had violated his constitutional right to due process under the Fourteenth Amendment. The judge to whom the petition was addressed agreed that this was so and issued a rule to show cause why a writ of habeas corpus should not be granted. Then the judges of the District Court assembled *sua sponte* and heard oral argument and received briefs.

The majority overruled the judge who had issued the rule to show cause and refused to permit petitioner to prove the truth of his averments. Petitioner asserts that the judges of the District Court were without power to act as they did en banc and in any event, the denial to him of an opportunity to prove his averments constituted a violation of the due process clause of the Fifth Amendment.

II. BASIS OF JURISDICTION.

The jurisdiction of this Court is sustained by Section 1254(1) of the Code of Judiciary and Judicial Procedure, 28 U. S. C. A. 1254(1).

The decision sought to be reviewed is a final judgment of the United States Court of Appeals for the Third Circuit filed on October 26, 1951, affirming the dismissal by the United States District Court for the Eastern District of Pennsylvania of a Petition for a writ of habeas corpus alleging deprivation by the State of Pennsylvania of petitioner's right to due process under the Fourteenth Amendment to the Constitution of the United States.

Petitioner has exhausted all "state remedies." *Conviction*—Commonwealth v. Smith, Philadelphia, Oyer and

---

8. This point is treated in the Majority Opinion pp. 2-5, 192 F. 2d 543-544; and in the Dissenting Opinion p. 37, 192 F. 2d 560. Petitioner briefs the point post p. 68 et seq.

Terminer, opinion filed March 4, 1949 (unreported), aff'd 362 Pa. 222, 66 A. 2d 764 (1949). *Habeas Corpus*—Commonwealth ex rel. Smith v. Ashe, 364 Pa. 93, 71 A. 2d 107 (1950), cert. den. 340 U. S. 812 (1950). This point is conceded by the Commonwealth and all judges of the two federal courts below.

III. QUESTIONS PRESENTED.

1. Where Petitioner had a long history of mental disease including medical discharge from the Army, treatment in mental hospitals and an adjudication of insanity, was it a denial of procedural due process of law under the Fourteenth Amendment to arraign him on a capital charge in the absence of his family, friends and counsel where he thereby lost his only chance under State law of having his mental incapacity determined *in limine* by a *jury* from the failure to make the need for such determination known to the court "upon arraignment"?

2. Where almost the whole of such a man's defense is insanity, and he is indigent and thereby unable to procure a psychiatrist to help in the presentation of his defense, is it a denial of due process of law to refuse to permit petitioner to hire a psychiatrist at public expense?

3. On a guilty plea admitting second degree murder only was it a violation of procedural due process for the trial court, having heard only the testimony of the prosecution, to adjudge petitioner's guilt to be murder of the first degree and to refuse thereafter to consider or indeed hear any testimony (whether medical or not) except on the issue of whether the penalty should be life imprisonment or death?

4. Consistent with the requirements of procedural due process and in the absence of state statutory authority

does a court composed of three judges have power to decide after acceptance of guilty plea the issue of mental capacity of petitioner to so plead?

5. Did the sentencing court violate procedural due process in refusing to dispose *in limine* of the issue of mental capacity to be tried and then dispose of it after guilty plea by applying the legally *irrevelant* formula of ability to distinguish right from wrong and without hearing any evidence, expert or otherwise, on the legally *relevant* question of capacity of defendant to appreciate his peril and to cooperate in his defense?

6. Was it a denial of procedural due process of law for the Supreme Court of Pennsylvania to refuse to permit Petitioner to prove by testimony the facts alleged in a procedurally proper petition for habeas corpus which prima facie showed deprivation of procedural due process under the Fourteenth Amendment by a lower Pennsylvania court?

7. Where a single judge of the District Court of the United States has examined a petition for writ of habeas corpus alleging violation of procedural due process under the Fourteenth Amendment by state officers, has the District Court jurisdiction to sit en banc and dismiss the petition by vote of four judges over the dissent of three judges including the judge who granted the rule?

8. Was the District Court or a judge thereof obliged, by the Fifth Amendment and the averments of the petition to hear and determine the facts of this case?

IV. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The present case presents many questions of fundamental importance in the administration of constitutional law, particularly with regard to deprivation by state authority of life and liberty contrary to the requirements of procedural due process under the Fourteenth Amendment.

1. The majority of the court below posed the following problem:

> "Has a man a constitutional right not to be tried or executed if 'insane' or not to meet the penalty for a crime committed while in that condition? Is the imposition of criminal responsibility in such case, in the words of Mr. Justice Black, so 'offensive to the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' that it violates substantive due process?"

To that grave problem the majority specifically answered "We do not know."

The minority judges of the court below say that the answer is an unequivocal "Yes" to both questions. So do the judges of the Eighth Circuit in *Ashley v. Pescor*, 147 F. 2d 318; see also *Youtsey v. United States* (6th Cir.), 97 F. 937.

The majority say in the present case they were not called upon to decide that question. The minority say that the Court necessarily decided it. These questions had to be decided in this case and in effect they were decided negatively by the majority despite the statement that it was not necessary to decide them at all.

In *Phyle v. Duffy*, 334 U. S. 431 and *Solesbee v. Balkcom*, 339 U. S. 9, questions of post-trial insanity were sufficiently important to require decision. The questions posed in the present case are even more fundamental.

2. The majority opinion says that petitioner has a substantive right derived from state law not to be tried while insane. The majority then concludes that "Smith is entitled to have procedural due process observed in the protection of these substantive rights even though substantive due process would not compel the right to be given."

The majority cites no case but petitioner hopes the majority is right. So, it is necessary to decide this case in the light of the procedural due process question arising under the Fourteenth Amendment and not merely by considering whether the state court conformed with state procedure. This is what the majority did despite the above statement.

3. The question whether a state court can accept a plea of guilty and sentence to death a putative insane man, as to whom no judicial inquiry has been made prior to acceptance of plea and without prior investigation of such insanity, is too important to rest in the unsatisfactory situation in which the divided views of the Court of Appeals leaves it. In effect the situation is the same as if two panels from different circuits were in conflict.

4. The question whether, in the light of present medical science a state court meets its duty under procedural due process restrictions of the Fourteenth Amendment by appointing legal counsel but refusing to bear the expense of a medical witness on a reasonable claim of mental incompetency should be settled. To answer this in the affirmative does not mean that the state would also have to furnish engineers, plumbers, repairmen or other experts.

5. The question whether a putative insane man may be adjudged mentally competent *to be tried* by applying the legally irrelevant formula of the M'Naghten rule should be decided. So also should the separate question of the right

of state courts, in the light of modern medicine and science, to apply with rigid formality the M'Naghten rule to the question of responsibility for crime.

Neither the trial court nor the majority opinion of the lower court seems to have grasped the great distinction between the "insanity" which will excuse conduct otherwise criminal and the "insanity" which bars trial. The latter never did involve the M'Naghten rule. A man who cannot appreciate his peril or cooperate with counsel may not be tried. It is not controlling that he may or may not have known the difference between right and wrong at the commission of the act charged as murder. This is not mere error; this unavoidable question has not been decided in this case.

In the light of the evidence of the slowly progressive and presently profound mental illness of the psychiatrist himself, subsequently ascertained, it is at least doubtful even that the psychiatrist selected by the court was the impartial expert upon whose judgment a court could confidently rely to spell the difference between due process and the lack of it. See affidavit of counsel post p. 21.

The issues of this case are important to the administration of criminal justice. They are mighty important to petitioner too. Six Federal judges have said petitioner's case should be heard and adjudicated by finding facts. This has never been done. He cannot be permitted to die unheard.

WHEREFORE, your petitioner, James Smith, respectfully prays that a writ of certiorari may issue out of and under the seal of this Honorable Court, directed to the Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and all proceedings therein; and that the order of the Court of Appeals for the Third Circuit affirming the judgment and

sentence be reversed and that your petitioner have such other and further relief in the premises as to this Court may seem just and proper.

HERBERT S. LEVIN,
THOMAS D. MCBRIDE,
Attorneys for Petitioner.

SUPPLEMENTAL APPENDIX TO PETITION.

Affidavit of Counsel.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

THOMAS D. MCBRIDE, being duly sworn according to law, deposes and says:

1. This case was argued orally by him before the full bench consisting of the seven judges of the Court of Appeals on April 20, 1951. The Opinion of the Court and the Dissenting Opinion were delivered on October 26, 1951.

2. One of the crucial issues in the case was whether petitioner, at the time of entering a plea of Guilty to the crime of Murder, was mentally competent to do so. Another crucial issue was whether he was insane at the time of the commission of the "crime".

The majority opinion, in resolving certain of petitioner's procedural points on these issues against him specifically and necessarily rests upon the fact that during the course of its proceedings, the sentencing court had appointed "an apparently qualified and impartial expert", Dr. William Drayton, to examine petitioner and had called him as its witness.

The majority stresses in a footnote Dr. Drayton's qualifications as follows:

> "Chief of the Philadelphia General Hospital psychiatric department since 1926; neuro-psychiatrist in the Philadelphia Municipal Court since 1922; associate professor neuropsychiatry in the Graduate School of Medicine of the University of Pennsylvania."

The majority held that all questions as to the sufficiency of the examination and its scientific accuracy would affect only the weight of Dr. William Drayton's evidence and hence was not before the court on habeas corpus. It assumed his competency to make psychiatric examinations as

of the time he made them because of his stated qualifications. The legal adequacy of the examination by Dr. Drayton, which is attacked by the minority opinion, was made a few days prior to November 5, 1948. If Dr. William Drayton was not at that time competent to make such examination, or if his own capacity to form judgments was not that of an "expert", more than the mere weight of his testimony would have been affected.

3. In December, 1951, rumors came to deponent's attention that Dr. Drayton had ceased to be connected with either the Graduate School of Medicine or the Philadelphia General Hospital Psychiatric Department in 1949 and was suffering from some form of senile dementia. Deponent investigated and has ascertained the following facts:

On September 20, 1951 (about one month prior to the opinion of the Court of Appeals) Dr. Winifred Stewart Drayton, wife of Dr. Drayton, filed a petition in the Court of Common Pleas No. 3 of Philadelphia County for the appointment of a guardian for him, as of No. 383, September Term, 1951, in which she stated, under oath, that owing to weakness of mind Dr. Drayton was unable to take care of his property and was liable to dissipate or lose the same or become the victim of designing persons.

On September 18, 1951, Dr. William Drayton had been committed under the Pennsylvania Mental Health Act to the Pennsylvania Hospital for Mental Diseases and remained there for observation and treatment until October 12, 1951, at which time he was transferred to the Veterans Hospital, Coatesville, where he is now suffering from a non-recoverable mental illness.

Deponent, with the full consent of Dr. Winifred Drayton, wife of Dr. Drayton, interviewed Dr. Joseph Hughes, 111 N. 49th Street, Philadelphia, Pa., the psychiatrist who is handling the case of Dr. William Drayton.

Dr. Hughes informed deponent on January 12, 1952, that Dr. Drayton's present condition is non-recoverable and that it may be described as "Psychosis with Cerebral

Arteriosclerosis". He says that Dr. Drayton no longer has any judgment or insight, that he is unable even to recognize his wife or friends, that he is confused, disturbed and overactive; that he has progressive loss of memory and confabulates to fill in memory defects. He added that this intellectual deterioration was evidenced even on a clinical level in January, 1951.

4. Deponent avers that the depths and profoundness of the gradually progressive arterio-sclerotic changes which have taken place in Dr. Drayton show that his sole opinion stated to the court on November 5, 1948, to the effect that petitioner had no psychosis and was merely "faking", cannot be legally relied upon as the sole determining factor to demonstrate whether petitioner received due process of law. The case of petitioner warrants and requires further investigation even as to this particular aspect by reference to Philadelphia General Hospital and Graduate School records, etc., concerning Dr. Drayton which may be done if the case is remanded for hearing.

5. Since the appeal to the Court of Appeals was, and this petition for certiorari is, for the purpose of securing a hearing in the District Court on the procedural issues raised by the petition for writ of habeas corpus, deponent, on behalf of petitioner, asks leave that this affidavit be received and acted upon by this Court, particularly since the facts stated in it were discovered too late to form the basis of a petition for reargument before the Court of Appeals and so soon before the expiration of the time within which certiorari must be applied for as to make it necessary that they be communicated to this Court at once.

THOMAS D. MCBRIDE.

Sworn to and subscribed before me this 14th day of January, A. D. 1952.

MARTHA A. RAU,
Notary Public.

(Seal)

My Commission Expires 1/7/55.

BRIEF IN SUPPORT OF PETITION.

Summary of Argument.

It will be the purpose of petitioner to show that he suffered separate and distinct, though related denials of the procedural due process guaranteed him by the Fourteenth Amendment at various stages of these proceedings.

The first occurred when he was arraigned on this capital charge and no appointment of counsel was made prior thereto. He thereby lost his only opportunity to have a jury trial *in limine* to decide whether he was competent to be tried on the main issue.

By reason of having been overreached on arraignment, and being thereafter denied other statutory methods of having his mental capacity adjudicated he entered a plea of guilty. He will argue that this plea of guilty is void in that (a) it was a conditional rather than an absolute plea and hence the trial court was without legal warrant to accept it; (b) although the plea of Guilty admitted only murder in the second degree, the court improperly, after hearing only the Commonwealth's version of the case, found defendant guilty of murder in the first degree and thereafter unduly restricted his evidence on the facts as well as on mental illness to the question of the kind of sentence to be imposed; (c) a court convened to hear a guilty plea has authority only to fix the degree of the homicide to be imposed and therefore, being without authority to decide mental capacity, did not decide it; (d) if the court attempted to decide petitioner's mental capacity it received no competent data upon which to base decision.

It will be his purpose thereafter to demonstrate that the Supreme Court of Pennsylvania not only failed to re-

dress these denials of due process by the trial court but itself denied him due process in that it refused to and did not adjudicate his case.

Petitioner will finally contend that the District Court for the Eastern District of Pennsylvania denied him due process under the Fifth Amendment in refusing to hear and adjudicate his petition for habeas corpus which was not only procedurally correct but which, if true, demonstrated the foregoing violation of Fourteenth Amendment rights by the Pennsylvania courts, both trial and appellate.

General Statement.

At the threshold we are met by the fundamental questions posed and left unanswered by the majority opinion of the court below. Consonant with the Fourteenth Amendment may a State (a) hold an insane man criminally responsible for his conduct; (b) try an insane man; (c) execute an insane man? Lumping together these three vastly different procedural and substantive questions the majority specifically answers all of them "We do not know" (Opinion p. 5, 192 F. 2d at 544). This doubt colors the whole opinion.

As justification for this quandary, the majority cites *Solesbee v. Balkcom*; 339 U. S. 9. But the *Solesbee* case expressed no such doubt. It dealt only with procedural questions as to post-trial insanity (subsection (c) above) and simply held that states were free to leave that question to fair decision by the executive rather than the judiciary.

At this dubious point the majority opinion below then went on to hold, however, that since Pennsylvania law guarantees the *substantive* right of insane persons not to be held criminally responsible or to be tried, a federal question may arise as to whether *procedural* due process has been observed. But, having said this the majority were content to examine in the light of Pennsylvania law the methods Pennsylvania adopted (or failed to adopt) to ascertain the fact of insanity. The majority did not really

decide the question "What does the United States Constitution say about the handling of this case by Pennsylvania?"; or the further question "Was it fundamentally fair?" The last two are the real questions that should have been asked and answered. And in the present context they must be applied to the purely judicial (not executive) questions of "insanity" at the time of the killing and at the time of each step of the judicial proceedings.

A federal court, faced with decision of a claim such as that made in the present case, must examine the question for itself. *Hawk v. Olson*, 326 U. S. 271. In *Johnson v. Zerbst*, 304 U. S. 458, 468, this Court said "A judge of the United States—to whom a petition for *habeas corpus* is addressed—should be alert to examine 'the facts for himself when if true as alleged they make the trial absolutely void.'" See also *Forthoffer v. Swope*, 103 F. 2d 707, 710.

The majority opinion of the District Court went so far as to hold that so long as the State Supreme Court carefully and fully considered the claim of violation of *federal* constitutional right the federal court should not reconsider the claim even if the state court's conclusions were wrong. A similar reluctance pervades the majority opinion of the Court of Appeals.[1] The true rule is that when the state does not provide corrective judicial process, the Federal courts will entertain habeas corpus to redress the violation of a Federal constitutional right. *White v. Ragen*, 324 U. S. 760, 89 L. ed. 932, 65 S. Ct. 978. When the corrective process is provided by the state but the Federal question of constitutional violation, is erroneously decided

1. The dominant note of the opinion is that although a federal court is bound to pass upon claims of violation of federal rights yet "That these allegations have been decided on the merits by the highest state court is a fact to be given great weight by a district court in passing upon petitions for habeas corpus" (Opinion, p. 5, 192 F.2d at 544). In the context in which the majority made this statement it would appear to mean that the mere fact that the state decided the merits of the federal claim at all is to be given great weight by a federal court which is to decide whether that federal claim had been decided correctly. If this is so, what comes of the rule that the federal court must be careful to decide "for itself" the federal claim in view of the fact that prior state adjudication of the federal claim is a condition precedent to federal review?

the appropriate federal court has the responsibility to review the state proceedings. *Williams v. Kaiser,* 323 U. S. 471, 472, 89 L. ed. 398, 400, 65 S. Ct. 363; *Tomkins v. Missouri,* 323 U. S. 485, 89 L. ed. 407, 65 S. Ct. 370; *Hawk v. Olson,* 326 U. S. 271.

It is true that "due" process allows for difference in state procedures and that a majority of this Court hold that all the specific guarantees of the first eight amendments are not made operative against the states by the Fourteenth. Nevertheless, while this Court will take into consideration an established state procedure as an element in deciding whether that procedure violates due process, it would be permitting the state to lift itself by its own bootstraps to hold in a particular case that the decision of the highest court of a state (although binding as to what state law is) would be entitled to controlling weight on the question whether that law or a state court acting under color of that law has violated the federal constitution.

It certainly seems as though the Federal court should approach the problem by considering not only what Pennsylvania is doing and has done but what was permissible under common law and what is now permissible according to accepted civilized standards of fairness.

Except for a short time it was the rule under common law that an insane person was not criminally responsible and could not plead to an arraignment, be subjected to a trial or after trial receive judgment or after judgment undergo punishment. 1 *Hale P. C.* 34, 35; 4 *Bl. Comm.* 24, 25; 2 *Bish. Cr. Proc.* Sec. 666; *Frith's Case,* 22 How. St. Tr. 307; *Rex v. Pritchard,* 7 Car. & P. 303; *Commonwealth v. Ragone,* 317 Pa. 115;[2] *Bonds v. State,* Mart. & Y. 143; *Crocker v. State,* 60 Wis. 556, 19 N. W. 435; *Taffe v. State,* 23 Ark. 34; *Freeman v. People,* 4 Denio, 9; *Underwood v.*

2. The Supreme Court of Pennsylvania in the Ragone case, supra, says (p. 125): "Blackstone refers to a statute passed 'in the bloody reign of Henry VIII, . . . which enacted, that if a person being compos mentis should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this savage and inhuman law [he says] was repealed by the statute of 1 and 2 Ph. and M., c. 10.'"

People, 32 Mich. 1; *Guagando v. State*, 41 Tex. 626; *State v. Reed*, 41 La. Ann. 581, 7 South. 132. See *Nobles v. Georgia*, 168 U. S. 398; *Solesbee v. Balkcom*, 339 U. S. 9; *Youtsey v. United States*, 97 Fed. Rep. 937.

Even a man who admittedly was sane at the time he committed an offense cannot be called upon to plead or be tried if he has meanwhile become insane. *Commonwealth v. Ragone*, 317 Pa. 113. See also *Commonwealth v. Scovern*, 292 Pa. 26; *Commonwealth v. Endrukat*, 231 Pa. 529; *Commonwealth v. Cilione*, 293 Pa. 208; *Webber v. Commonwealth*, 119 Pa. 223. To do so would offend against that concept of fundamental fairness which is a minimum requirement of due process of law. *United States ex rel. Mazy v. Ragen*, 149 F. 2d 948; *People v. Nierstheimer*, 401 Ill. 260, 81 N. E. 2d 900; *State v. David*, 6 Wash. 2d 696, 108 P. 2d 641; *Carter v. State*, 198 Miss. 523, 21 So. 2d 404. cf. *Phyle v. Duffy*, 334 U. S. 431; *Ashley v. Pescor*, 147 F. 2d 318.

It would seem to follow that where accused's mental condition is questioned on a substantial basis the court must conduct an inquiry and employ such methods as may be necessary to reach a conclusion on the question and this entirely apart from whether it is satisfied with the evidence presented by the defense or prosecution. *United States v. Harriman*, 4 F. Supp. 186. See also *Deeb v. State*, 118 Fla. 88, 158 So. 80; *State v. Detar*, 125 Kansas 218, 263 P. 1071.

Where there is a doubt of defendant's sanity, even his counsel cannot waive such an inquiry. *Signs v. State*, 35 Okl. Cr. 340, 250 P. 938; *Norford v. State*, 116 Tex. Cr. Rep. 533, 34 S. W. 2d 290.

It seems to follow also that where the question arises before trial the inquiry ought to be made before trial because the test is not the ability to distinguish between right and wrong at the time of the act charged, but the then present ability of the accused properly to appreciate his peril and rationally assist in his own defense.

To "rationally assist in his own defense" the accused must have memory and mental capacity to prepare for trial by consulting with and assisting his counsel. In any case much less a capital one, how can such a question fairly be left until the trial itself?

This is not to say that in every case such inquiry must be made. It is not contended even that a mere suggestion of insanity throws such an affirmative duty upon the court. Petitioner does assert that in the present case the danger signals were constantly flaunted before the court. Before permitting petitioner to *plead guilty* of a capital offense a legally organized court was required to adjudicate[3] on competent relevant data, his mental capacity to waive his right to jury trial on the issue of degree of guilt and fixing of penalty. This has not been done in this case by any such Pennsylvania court.

It becomes important to consider, therefore, at what points in this proceeding the trial court had before it the opportunity and power of adjudicating this crucial question and how and why it failed or refused to do so.

Petitioner Was Overreached at Arraignment.

Petitioner, admittedly an indigent man, was arraigned without counsel a week after his indictment. An utter stranger, whom he had never seen before and never saw again, was directed by the court to stand beside him. Despite the fact that the Act of March 22, 1907, P. L. 31, Section 1, as amended, 19 P. S. 784,[4] requires the ap-

3. An adjudication involves the exercise of judicial power through a hearing upon an issue, the receiving and weighing of evidence and the act of rendering a judgment. *Chase-Hibbard M. Co. v. City of Elmira*, 207 N.Y. 455, 460; *Sans v. City of New York*, 64 N.Y.S. 681, 31 Misc. 559, 560; *State v. Huhn*, 346 Mo. 695, 700, 142 S.W.2d 1064, 1066; *Genzer v. Fillips*, 134 S.W.2d 730, 732.

4. "Whenever any person, being under indictment, charged with murder, shall make and file with the clerk of the court of quarter sessions an affidavit, setting forth that he or she is wholly destitute of means to employ counsel and prepare for his or her defense, the judge sitting in the court of oyer and terminer, to whom such affidavit is presented, shall assign to such person counsel, not exceeding two, to represent and defend such person at the trial of the case; . . ." As amended 1949, April 6, P. L. 406, § 1.

pointment of counsel for indigent persons indicted for murder in Pennsylvania, no counsel was appointed prior to arraignment. Neither the court nor the strange lawyer who was directed to stand beside petitioner knew anything about petitioner's background of insanity[5] and no attempt whatever was made to ascertain anything about petitioner even to the extent of learning whether he was represented by counsel (Amended Paragraph 3 of Petition for Writ of Habeas Corpus, Appendix 17a).

These averments must be assumed to be true since no opportunity was afforded to prove them either in the State Supreme Court or in the District Court below. *Hawk v. Olson*, 326 U. S. 271. Indeed the Respondents have never contended otherwise. Despite this, the State Supreme Court made the statement (364 Pa. at 103) that petitioner had counsel at each stage of the proceedings, and the majority opinion of the court below says "Nor is it a case where a friendless man has been overreached because he did not have legal counsel" (192 F. 2d 541 at 543). Neither statement could be further from the facts. The fact is that he was overreached at his arraignment because he did not have counsel present.

The majority opinion also says "The long record shows that Smith's claimed rights have been vigorously and intelligently asserted". Any such assertion came too late. And even when asserted they were denied.

The necessity of appointment of counsel in capital cases applies to every step of the proceedings,[6] including

---

5. This background is stated at length in the dissenting opinion, p. 38 et seq., 192 F. 2d at 561 et seq.

6. This Court has repeatedly held that failure to appoint counsel to assist a defendant or to give a fair opportunity to the defendant's counsel to assist him in his defense where charged with a capital crime is a violation of due process of law under the Fourteenth Amendment. Carter v. Illinois, 329 U. S. 173, 91 L. ed. 172, 67 S. Ct. 216; Hawk v. Olson, 326 U. S. 271, 90 L. ed. 61, 66 S. Ct. 116; Tomkins v. Missouri, 323 U. S. 485, 89 L. ed. 407, 65 S. Ct. 370; Williams v. Kaiser, 323 U. S 471, 89 L. ed. 398, 65 S. Ct. 363; Powell v Alabama, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55, 84 ALR 527; Moore v. Dempsey, 261 U. S. 86, 67 L. ed. 543, 43 S. Ct. 265. See also, DeMeerleer v. Michigan, 329 U. S. 663, 91 L. ed. 584, 67 S. Ct. 596 (convicted of first degree murder and sentenced to life imprisonment). In the

arraignment. *Evans v. Rives*, 126 F. 2d 633; *Robinson v. Johnston*, 50 F. Supp. 774.

In *Hawk v. Olson*, 326 U. S. 271 at 278, this Court said "We hold that denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violates the Fourteenth Amendment". It would appear *a fortiori* that failure to appoint any counsel at all between indictment and arraignment on a capital charge also violates the Fourteenth Amendment.

(a) In Capital Cases Prejudice Is Presumed to Result from Denial of a Constitutional Right.

Petitioner has shown that he was arraigned without counsel. What follows? In a capital case must he go further and show that prejudice resulted? And how much? Or must the State on the other hand show that such arraignment was not prejudicial? Has the harmless error doctrine any applicability at all?

The majority opinion says "It is a little hard to see how entering a plea of not guilty can deprive a man of any rights". (Opinion p. 6, 192 F. 2d at 545). The three dissenting judges see it clearly and state it cogently (pp. 22, et seq., 192 F. 2d 553 et seq.).

The majority then goes on to say that even though Petitioner lost the right to invoke the discretion of the court to grant a trial *in limine* of his mental competency that was not much of a right since the court had very broad discretion and could have postponed the trial of that preliminary question until the trial on the general issue. The majority then says "We conclude that the loss of such an opportunity was *not so prejudicial* to defendant as to

---

classic case of Powell v. Alabama, 287 U. S. 45, Mr. Justice Sutherland, speaking of the defendant, says: "He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect."

amount to violation of due process" (Opinion p. 7, 192 F. 2d at 545).

That misses the point. Under the rule of *Powell v. Alabama*, it is the failure in a capital case to appoint counsel that of itself violates due process. See also *Williams v. Kaiser*, 323 U. S. 471. In non-capital cases some resulting harm must also be shown. *Townsend v. Penna.*, 334 U. S. 736; *Bute v. Illinois*, 333 U. S. 640.[7] Upon remand of the *Townsend* case the Pennsylvania Supreme Court held that even though the prejudice entered the case *after* Townsend's plea of guilty, nevertheless not only the sentence but the plea itself was set aside. *Commonwealth ex rel. Townsend v. Burke*, 361 Pa. 35. This followed because it was the failure to appoint counsel prior to plea which accounted for the later prejudice. The situation was thought to be analogous to a blood stream infection which cannot be localized to the point of entry, and hence all the proceedings were set aside.

And besides, the majority has disregarded the direct holding of this Court in *Glasser v. United States*, 315 U. S. 60, 62 S. Ct. 457. There this Court said that the right to counsel "is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."[8]

---

7. In *Bute v. Illinois*, 333 U. S. 640, 674, the majority opinion denied any affirmative duty to appoint counsel by state courts in non-capital cases, in the absence of a request, but agreed that the Court in capital cases should affirmatively initiate an inquiry into the desire of the accused to be represented by counsel, to inquire into the ability of the accused to procure counsel, or, in the event of the inability of the accused to secure counsel, to assign competent counsel to the accused to conduct his defense. Here, none of those things was done at or before arraignment.

8. It even disregarded its own holding in *United States v. Venuto*, 182 F. 2d 519, where the trial court was reversed for unduly enjoining counsel from consulting with his client during a recessed cross-examination. The Opinion was written by Judge Lederle sitting by designation but joined in by Chief Judge Biggs, one of the dissenting judges in the present case, and Judge Hastie, one of the majority. In that case the Court quoted from *Glasser v. United States*, 315 U. S. at p. 76 and then said "We reject the government contention that defendant and his counsel must prove affirmatively the exact prejudice produced by this injunction in a federal prosecution." Even in a non-capital state case when defendant has pleaded guilty all that need be proved is that "for want of benefit of counsel an ingredient of unfairness actively operated in the process that resulted" in the sentence. *Foster v. Illinois*, 332 U.S. 134, 137.

The majority said (p. 8, 192 F. 2d 546):

> "We conclude, therefore, that even if Pennsylvania did not provide defendant with 'effective assistance of counsel' at his arraignment, he suffered no deprivation of federal constitutional right because of it."

This is a brand new statement of law. It is far different from saying that the nature of the harm resulting from failure to appoint counsel may be considered on the question whether such failure violates a constitutional right.

Clearly in this capital case it was the duty of Pennsylvania to provide defendant with effective assistance of counsel and the Court is saying that even if it did not do so no right was violated. And the context shows that the Court says that no right was violated because "Due process does not go so far as to require a hearing on mental condition in any particular manner or at any particular stage in the proceedings. Certainly it does not require a hearing *in limine* on the question as counsel for relator contend. The most that it requires, in our view, is an opportunity to have adequate hearing on the question before guilt is finally determined."

It becomes clear, therefore, that the majority is holding not only that the denial of "effective assistance of counsel" is not of itself a violation of constitutional right but that it does not attain that importance unless an additional separate violation of constitutional right results from it. Even in non-capital cases where harm must be shown to have resulted, the harm need not be so great as to constitute of itself a separate and distinct violation of constitutional right but need be only prejudicial. *Bute v. Illinois, supra; Townsend v. Pennsylvania, supra.*

The majority opinion does not assert that at arraignment the denial of a fair chance to invoke the discretion of

the court to impanel a special jury was not prejudicial.[8a] The conclusion is "that the loss of such an opportunity was *not so prejudicial* to defendant as to amount to a violation of due process." (Emphasis supplied.)

It is respectfully suggested that to try the issue of present mental incompetency along with the main issue, whether or not justified under the old common law, does not now meet the test of due process. But, at the very least, it is not as satisfactory as having the issue disposed of *in limine*. At common law a defendant charged with felony was not permitted to testify. It is precisely because of the present right of a defendant to testify that it is essentially unfair to put him on trial before the same jury on two issues, (1) mental capacity to be tried; (2) guilt or innocence of the charge.

Obviously, to do so would be in effect to rule out the first issue or to prevent the defendant from testifying on the merits. It is miserably unfair to require a defendant to choose between remaining off the stand or to testify on the merits and at the same time attempt to convince the jury that they ought to disregard his evidence because he is so mentally incapable that he does not know what he is talking about. Not all persons who unsuccessfully claim insanity are first degree murderers. Some of them may be not guilty in any event or guilty in a lesser degree. This is the anomalous situation that counsel, had petitioner had one at arraignment, could have pointed out in invoking the discretion of the court to grant a jury trial *in limine*.

(b) Petitioner in Fact Was Fatally Prejudiced.

The question is not whether Petitioner unaided could have persuaded the court to exercise what the majority opinion calls a "broad discretion" but whether counsel,

8a. The State Supreme Court had held in *Webber v. Commonwealth*, 119 Pa. 223, that under the common law the court had discretion at arraignment to specially impanel a jury to try the issue of mental capacity to plead or defer the trial of that issue and have it disposed of by the jury which tried the indictment.

seasonably appointed and informed of petitioner's background, could have persuaded the court.[9] The court might not have granted a jury trial *in limine* but then again it might have.

The right to have informed counsel attempt to persuade a judge to do something which that judge has the discretionary right to do is a far different thing from petitioner alone having such right. Any other view would negative the value of counsel in any case. Everybody knows that it is particularly in matters involving discretion that the presentation of the facts and argument thereon by counsel may persuade a court to take affirmative action on behalf of a client where the client, left to present the facts and arguments himself, might not be able to persuade the court. Cf. *Townsend v. Pennsylvania, supra.*

The majority opinion points out that there still remained certain ways in which petitioner's mental condition could have been decided (Opinion, p. 8, 192 F. 2d at 545 et seq.). The Court concludes, therefore, that whether he was overreached in this *one* way is unimportant since he still had others. It is submitted the opposite view should be taken. If a man has three or four legal ways of protecting a right he cannot be overreached on any of them, or, at the very least, the remaining ones must leave him substantially as much protection without the one upon which he was overreached. *None of the other ways provided for trial by jury of the issue of mental competency prior to trial of the general issue.* Had petitioner been

9. Even the Opinion of the State Supreme Court points up the harm resulting from the arraignment. The Court said (364 Pa. 93, 106, 107):

"* * * Now counsel contends that the insanity with which Smith was afflicted in 1945 was permanent. If it was, he was insane at the time he committed the murder charged and it was the duty of the defendant's counsel to ask to have the issue of his sanity determined by a court and jury as provided by Section 67 of the Act of March 31, 1860, P. L. 427, 19 P. S. 1352.

Petitioner agrees. This section is applicable at arraignment. (Supplemental appendix to Brief for petitioner 49a). But the stranger who stood beside petitioner at arraignment as "defense counsel" was necessarily uninformed of the facts which would have warranted the court in directing that petitioner's sanity be determined *in limine* by a jury.

afforded a jury trial *in limine* he would have been attended at that trial with his usual constitutional safeguards, such as confrontation, etc. He would even have had the right to have the jury properly instructed on the law. *Commonwealth v. Simanowicz,* 242 Pa. 402.

But in all other pre-trial statutory proceedings, such as commission in lunacy, etc., there are none of the usual constitutional safeguards such as confrontation. *Commonwealth v. Iacobino,* 319 Pa. 65.

The difference could hardly be more forcefully illustrated than by the *Simanowicz* case, *supra.* There, the court permitted counsel to act as a party petitioner in alleging that the defendant was not mentally competent to confer with him and granted an issue under Section 67 of the Act of March 31, 1860, P. L. 427 (Supplemental Appendix to Brief for Petitioner, p. 49a).[9a] At the trial of this preliminary issue the court, however, incorrectly instructed the jury that the defendant had the burden of proving insanity beyond a reasonable doubt instead of by fairly preponderating evidence. The jury found the defendant sane. Counsel then advised, and Simanowicz entered, a plea of Guilty. Simanowicz was condemned to death. Upon appeal the Supreme Court held that the error in the preliminary proceeding rendered that proceeding void and the situation was not cured when later, by advice of counsel, defendant pleaded Guilty. The Court said "The prisoner never had a trial on the preliminary issue which was properly submitted to the jury and his right to one could not be waived by counsel."

In the present instance defendant had no such trial either and was prevented from the opportunity of getting one by being arraigned without counsel. Petitioner, like Simanowicz, pleaded Guilty on advice of counsel. The court in Simanowicz' case held that such plea was void; but the court in the present case held that petitioner was bound by it.

9a. This is the section applicable at arraignment referred to above.

There is no substantial difference between the two cases. Certainly the loss of such a preliminary jury trial is a real loss. The loss was not merely a difference in the tribunal that might do the deciding, that is, *Jury v. Commission*, although that too may be tremendously important. The fundamental difference lies in the procedural safeguards attendant upon the jury trial but not upon the commission hearing.

It must be emphasized that the question here however, is not whether this denial of jury trial *in limine* is itself a denial of due process. The question is whether this loss constituted prejudice resulting from failure to appoint Counsel. This is a matter for independent federal appraisal.

The further proceedings in the case only illustrate that petitioner, having been put on the wrong road, was unable to get back. After his arraignment, having lost his *only* chance of having his mental competency determined *in limine* by a *jury*, he tried to pursue the other non-jury alternatives thought to be still open to him. He was denied them also. Here is what happened:

Petitioner had been arraigned on February 25, 1948. Then, on or about March 16, 1948, Mr. Levin, who was still private counsel for petitioner, filed a petition with the Court of Oyer and Terminer of Philadelphia County, asking for the appointment of a Commission to inquire into and report upon the mental condition of petitioner. (Supplemental Appendix 62a.) This petition recited such a previous history of mental derangement as would warrant the appointment of such a Commission, not only under the Pennsylvania Mental Health Act of July 11, 1923, P. L. 998, 50 Purdon Statutes 1, *et seq.*, but also under the common law power of the court which has been held to remain unaffected by the statute. See *Commonwealth v. Barnes*, 280 Pa. 351, 124 A. 636. The Commonwealth filed no answer to this petition. Nevertheless, it was dismissed (para-

graph 5, Petition for Writ of Habeas Corpus, Appendix 5a).[10]

Thereafter, counsel unsuccessfully exhausted all available means of ascertaining the history of petitioner's mental illness. The conspicuous lack of success was due only to petitioner's poverty which deprived petitioner of the effective assistance which he could have had if he were able to pay for a reasonable investigation (paragraph 6, Petition for Writ of Habeas Corpus, Appendix 5a).

Thereafter, counsel prepared a petition to withdraw as private counsel, and filed it with the judge to whom petitioner's case had been assigned for trial. That petition set forth the mental history of petitioner so far as counsel had been able to ascertain it and the inability of counsel to proceed with the proper preparation of the case by reason of petitioner's poverty, and suggested that upon allowance of the petition to withdraw, counsel could then be appointed to represent petitioner and that the desired information could possibly be obtained by such court-appointed counsel (paragraph 7, Petition for Writ of Habeas Corpus, Appendix 5a, paragraph 15 of Petition for Leave to Withdraw, Supplemental Appendix 69a).

Upon allowance of said petition Mr. Levin was appointed as counsel together with Harry Berkowitz, Esquire. They endeavored, in consultation with the prosecuting attorney and the court, to obtain a psychiatric examination of petitioner, to no avail (N. T. 239; Petition for Writ, paragraph 8, Appendix, p. 5a), and, in consequence, they were unable properly to determine whether petitioner was sane at the time he killed the cab driver, or able to comprehend the charges against him, and able to cooperate in his defense (paragraph 8, Petition for Writ of Habeas Corpus, Appendix 5a).

The issue of mental incompetency in Bar of trial was fairly raised at every opportunity petitioner had to raise

10. See arguments *post* on footnotes 12 and 13 of the opinion of the court below.

it but it was never decided in any judicial proceeding whatever much less one which meets the test of due process. These attempts were not mere "suggestions" of insanity, they constituted no mere fishing expedition. They were supported by allegations of substantial facts.

Now we come to footnotes 12 and 13 of the majority opinion (p. 8, 192 F. 2d at 545, 546). These innocent looking footnotes may mislead.

The majority opinion says in footnote 12 "Relator's counsel applied to the court for the appointment of such a Commission but it was denied because only the warden may make such application. See *Commonwealth v. Barnes*, 280 Pa. 351, 124 Atl. 636 (1924). The warden refused to apply for it. *Such* refusal is reviewable by mandamus. See *Commonwealth ex rel. Smith v. Ashe*, 364 Pa. 93, 116, 71 A. 2d 107, 119 (1950), cert. den. 340 U. S. 812 (1950)." (Emphasis supplied.)

At petitioner's arraignment even the majority opinion concedes that the court was free to exercise its own discretion to grant him a trial by jury *in limine*. Thereafter, it had no such authority. Not only did the warden refuse to apply for a Commission but he refused to apply for it at the request of the judge. The Court held itself powerless because of the warden's refusal and without authority to grant the petition. (See Opinion of State Supreme Court, Supplemental Appendix for Appellant, pp. 33-34).

The majority opinion *now* indicates that the warden's refusal was reviewable by mandamus; but the judge before whom the petition was pending did not say that. Neither did the Supreme Court of Pennsylvania. They had held precisely the contrary. The law was that the warden was vested with power to prevent the court from acting. *Commonwealth v. Barnes*, 280 Pa. 351; *Commonwealth v. Green*, 346 Pa. 172; *Commonwealth v. Dunn*, 47 D. & C. 685.

The case cited by the majority as authority for the court to mandamus the Warden is this very case. It was in the post-trial writ of habeas corpus that the Supreme

Court of Pennsylvania for the first time held that a post-trial refusal by the warden is reviewable by mandamus. Petitioner is even being impaled upon *after-discovered law.* The majority perhaps failed to appreciate that. At least they did not point it out. Mandamus was not a remedy which was open to petitioner at the time.[10a]

In footnote 13, the majority says that there was still another way open to petitioner under another paragraph of the same Section 308 which applied to the Warden.[11] This paragraph provides that upon production or appearance of a person charged with a criminal offense in court it shall appear to the court that such person is insane, the court may go through the usual proceedings for his commitment "upon application of some person to be designated by the court". The majority then adds: "This provision appears to have been disregarded or overlooked by counsel."

How about the Court? It appears equally to have been overlooked or disregarded by the court. The petition for appointment of a Commission was filed under the Mental Health Act. It was denied because of the provisions of Section 308 of that Act. Section 308 contains this particular provision. Later, when the case was called for trial, counsel conferred with the assistant district attorney and the judge, and ways and means were sought out of the dilemma (Petition, par. 10, 11, 12). Maybe everybody overlooked it. Who is to suffer? Is this putative insane man the only one in this whole sorry business who is held to a knowledge of the law?

10a. It is not clear as the majority assumes that the pre-trial refusal by the Warden to act as party petitioner has even yet been held to be reviewable by mandamus. The State Supreme Court did say with particular reference to *post-trial* insanity that if the proper prison official refused to act as party petitioner mandamus would lie to compel him to do so. Besides, that is far different from saying that counsel or the petitioner himself could ignore the prison official and act as petitioner without his consent. Indeed it must be remembered that the Judge, with Section 308 before him tried to persuade the warden to act as party petitioner but the warden refused (see Supreme Court Opinion, pp. 33-34). The Court either did not then have the power of mandamus or failed to exercise it.

11. Both paragraphs of Section 308 are quoted in the majority opinion, p. 8, footnotes 12 and 13, 192 F. 2d at 545, 546. The section in full appears in "Supplemental Appendix to Brief for Appellant" pp. 51a-53a.

That same provision referred to by the majority has been in the Mental Health Act of Pennsylvania since 1923. And if it was overlooked here it was overlooked by the Supreme Court of Pennsylvania in *Commonwealth v. Barnes*, 280 Pa. 351, cited by the majority and overlooked by the same Court in *Commonwealth v. Green*, 346 Pa. 172, and by the Quarter Sessions Court in *Commonwealth v. Dunn*, 47 D. & C. 685.

It is to be emphasized that the language quoted by the majority in footnote 13 is part of Section 308 quoted in footnote 12. That entire section was before the court in those cases which held that only the warden or other official was a proper party petitioner.

The State Supreme Court even had that whole section before it in the present case and came to the same conclusion. (Supplemental Appendix for Appellant, pp. 33-34, 364 Pa. at 97.) In fact, counsel did *not* overlook this provision but specifically argued it in his brief on law filed in that Court (pp. 23-24). Despite that the State Supreme Court held that neither counsel nor the petitioner himself was a proper party petitioner (pp. 33, 34; 364 Pa. 97, 98. It is clear therefore that such a remedy was not available to petitioner. The decision of the Supreme Court of Pennsylvania settles that point and the Court below is not free to disagree.

Presumably the various opinions of the State Supreme Court holding that under all the provisions of Section 308 the proper prison official is an indispensable party petitioner were stated with full knowledge of the language of the fifth paragraph. Consistent with that interpretation, the fifth paragraph would then apply to criminal cases where the defendant was not incarcerated in jail waiting trial. It would cover cases where he had been released upon bail.

It is clear, therefore, that having been effectually prevented by failure to appoint counsel at arraignment of the right to invoke the discretion of the court to grant a jury

trial *in limine* petitioner was later denied the privilege of employing a psychiatrist at public expense, and was also denied all statutory rights of having his mental competency to be decided prior to trial. The only way thereafter in which he could have his mental capacity determined would be by persisting in his plea of not guilty and having the issue submitted to the very jury which would try the general issue of guilt or innocence.

Even if this were still open to him it does not excuse the denial of the other remedies. But, as pointed out above, this seems to be a pretty unrealistic procedure in view of the fact that it would put him to the necessity of remaining off the stand on the issue of innocence or degree of guilt. Besides, since at such trial the burden would lie on petitioner to prove such insanity by a preponderance of the evidence, he could not do so on lay testimony and had no means whereby he could secure psychiatric aid. This is specifically averred in Paragraph 31 of the Petition.

Being unable, without such expert testimony, to meet this burden of proof (Petition, Paragraph 9) the situation of petitioner was made known to the court (Petition, Paragraph 10) and with full knowledge of it, a conditional plea of guilty was accepted (Petition, Paragraphs 12, 13). That is how he got into the cul-de-sac which prevented him from persisting in the plea of not guilty.

Therefore the question of petitioner's mental capacity to be tried was never determined as a separate issue prior to acceptance of the plea. Once the plea of guilty was accepted it put it beyond the power of the judges assembled en banc (whose sole statutory power was to fix the degree of guilt and the penalty to be fixed thereon) to adjudicate the issue of petitioner's insanity. (See Pennsylvania Statute, Supplemental Appendix to Brief for Appellant, p. 54a). No legally constituted tribunal with power to decide that question was ever assembled in this case and that question therefore has never been legally determined. This impasse and this result was caused, to a large degree at least, by the arraignment of petitioner without counsel.

Petitioner invites the attention of the Court to *Frame v. Hudspeth*, 109 F. 2d 356 (10th Circuit), in which it was held that where the trial court's attention was called to the fact that accused had once been adjudged insane and had been an inmate of an insane asylum, it became the court's duty to make a specific finding regarding accused's mental condition and in absence of any such finding the proceedings at time of trial could not be sustained. However, in the *Frame* case the Circuit Court of Appeals did not reverse the District Court which had failed specifically to make such finding, holding that there was sufficient evidence on the record to show that the District Court was justified in accepting a plea of guilty. One judge dissented. This Court granted certiorari and reversed the Circuit Court of Appeals and directed that the case be remanded for a specific finding. *Frame v. Hudspeth*, 309 U. S. 632, 60 S. Ct. 712. Such differences as distinguish criminal cases which come here from a state from those from lower federal courts seem inapplicable to distinguish this case.

See also *Robinson v. Johnston*, 50 F. Supp. 774; *Honaker v. Cox*, 51 F. Supp. 829.

The State Denied "Effective Assistance" of Counsel When Under the Facts of This Case It Denied the Requests for Appointment of a Psychiatrist to Aid the Appointed Lawyer.

Petitioner relies upon the analysis of the dissenting opinion (pp. 34-36, 192 F. 2d at pp. 559-60). He would like, however, to make the following supplementary observations regarding the majority opinion.

There can be no doubt that the request for the appointment of a psychiatrist was made [12] (see N. T. 239; See also Supplemental Appendix to Brief for Appellant, 62a, 64a. Id. paragraph 11, 68a, 71a; Supplemental Appendix for Appellant, p. 9, paragraph 31. Id. paragraph 34, p. 10).

12. The majority says that "There is nothing in the record that a request for such help was ever made." This flies directly in the face of the record.

The majority opinion indicates (p. 10, 192 F. 2d at 546) that Petitioner contended as a general proposition that it is lack of due process of law to fail to provide a psychiatrist at public expense to assist an indigent defendant's appointed lawyers in any case which involves a question of his insanity. This is not so.

He does not contend that the right shall exist in every case or on a mere suggestion. But in a case such as his, where a sworn petition showed a prior adjudication that he was insane and mentally incompetent to stand trial, on a diagnosis of a progressive disease such as schizophrenia of a hebephrenic or a catatonic type, the refusal of psychiatric aid sterilized the "appointment of counsel". One might be mentally capable of standing trial in January and incapable in June. Anybody who knows anything about schizophrenia knows that it is a psychosis and constitutes legal insanity.

The situation is not the same as the case of a "psychopathic personality" involved in the case of *McGarty v. O'Brien*, 188 F. 2d 151.

The majority opinion relies heavily upon *McGarty* in holding that the appointment of a psychiatrist was not necessary. But there are many fundamental distinctions between this case and that of *McGarty*.

First: Under the Briggs law, Mass. G. L. (Ter. Ed.) c. 123, section 100A, as amended by St. 1941, c. 194, section 11, there was a mandatory requirement for the clerk of the court to give notice to the Department of Mental Health which "shall cause such person to be examined with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility." This report must be made available to those interested in the trial. These mandatory provisions were followed and McGarty was examined pre-trial in strict accordance with that statute.

In the present case there is no Pennsylvania statute making any such requirement, the court refused pre-trial

to appoint any expert either as a commission in lunacy or as a psychiatrist (N. T. 239) and held itself powerless to do so under the authority of *Commonwealth v. Green*, 346 Pa. 172. There was no pre-trial appointment of any psychiatrist to determine either "criminal responsibility" or "mental capacity to be tried". A psychiatrist was appointed after guilty plea only on the issue of the kind of penalty to be fixed, i.e. life or death. The State Supreme Court concedes all this.[13] Besides, the psychiatrist was not appointed in accordance with any standard procedure either common law or statutory; he was not connected with the trial Court and simply acceded to a request made of him.

Second: *McGarty* had had no previous adjudication of insanity or history of mental disease similar to that in the present case. The pre-trial report in *McGarty's* case concluded with the expression of opinion that "this prisoner is not suffering from any mental disease or defect which would affect his criminal responsibility". As pointed out in Judge Magruder's Opinion, the very category "psychopathic personality" is a rather blurred classification. Nobody pretends that schizoprenia is similar.

Third: The court in the *McGarty* case very carefully limited its opinion to the facts of that case, saying (p. 155):

> "How far the state, having the obligation to afford to the accused a fair trial, a fair opportunity to make his defense, is required under the due process clause

---

13. The Opinion says (p. 112); "When counsel for the relator entered a plea of guilty to the indictment, that plea admitted the prisoner's sanity because no insane person can be guilty of murder. The testimony relating to Smith's mental condition, taken after the plea had been entered, was for the purpose of providing the court with data which it could use in determining the appropriate *penalty* to be imposed upon the defendant." (Emphasis supplied). It is clear that the word "penalty" as thus used meant "sentence." In Pennsylvania "insanity" is not a defense applicable to degrees of homicide. It is either a full defense or none at all. Commowealth v. Iacobino, 319 Pa. 65, 70.

to minimize this disadvantage is a matter which, in other contexts, may deserve serious examination.

The issue presented for decision in the present case is a much narrower one. *This is not a case where the state has refused to provide an impartial psychiatric examination of the accused with a view to determining his sanity and criminal responsibility.*" (Emphasis supplied.)

But the present case is precisely of that latter kind. Petitions for a Commission in Lunacy and the request for psychiatric examination were denied. It was only after the plea of guilty was accepted, the Commonwealth's evidence fully heard and the court had already determined that the defendant was guilty of murder in the first degree that Dr. Drayton was called upon to examine him. Of course the examination was skimpy as demonstrated by the dissenting opinion and the exhibition in court of watching a man and pronouncing him to be a "fake" was simply absurd.

The majority says "There is a fallacy, we believe, in the assumption that the psychiatrist was called upon by the court to prove Smith sane. He was called upon by the court at the suggestion of Smith's lawyers, to give the court the benefit of his professional opinion, and he did." This is misleading because it would indicate that this was the first request and that the appointment of Dr. Drayton was satisfactory to defense counsel.

Dr. Drayton was the court's witness. That is far different from, and it is not an effective substitute for a hearing either *in limine* or at some stage of the proceeding to determine mental competency. The court, having found petitioner guilty of murder in the first degree, was certainly going through with an idle gesture so far as "mental competency to be tried" or "criminal responsibility" was concerned.

The majority opinion indicates fear that if psychiatric assistance is afforded defendant will call for other help such as ballistics experts, chemists, biologists, etc. There simply is no analogy at all between the right of a man to have medical help on the issue of whether he is mentally competent to stand trial and the kind of collateral expert assistance referred to by the majority. Petitioner is not promoting a "battle of the experts" or advocating a "psychiatric circus". He is saying that he needed the assistance of the only kind of Doctor who understands his type of disease in this fight for his life. That is not asking too much.

Finally in the *McGarty* case the Court was fortified in its view (188 F. 2d 151 at 157) because "there has been no challenge of the professional standing and competence of the psychiatrists whose examination and report has been furnished at state expense, and no question has been raised as to their complete impartiality or as to the thoroughness of their examination of the accused."

The dissenting opinion has demonstrated that the examination in the instant case was not thorough and the present condition of senile dementia of the very psychiatrist relied upon by the Commonwealth to give assurance that due process was observed raises a serious question as to the competency as well as the thoroughness of the examination (see Affidavit p. 21 et seq.).

The trial court was without authority to accept the guilty plea.

It would be a disservice to repeat at length the long history of mental illness of petitioner and the fact that it was called to the attention of the court at every available opportunity.

The Petition for Habeas Corpus recited in the first nine paragraphs (Supplemental Appendix for Appellant,

pp. 4, 5) the history of the case prior to plea. The following four paragraphs appear in the margin.[14]

It is submitted that under those circumstances the court was without authority to accept a plea of guilty of murder on a conditional basis and to make an agreement with counsel that the court would consider withdrawal of the plea of guilty in accordance with what the hospital records might show. Cf. *Commonwealth v. Senauskas*, 326 Pa. 69.

A Guilty plea is a solemn confession of guilt which constitutes a waiver of trial by jury and justifies the court in imposing sentence. The agreement contemplated that the court would decide the issue of petitioner's mental capacity. But it had no legal authority to do so. The majority opinion of the court below says that the question of petitioner's "guilt *or lack of it* was open in the trial court until the judgment of guilty was entered and penalty fixed" and that petitioner was not "precluded from having *his whole case* considered by the three judges who constituted the trial court" (Opinion, p. 13, 192 F. 2d 548). (Emphasis supplied)

---

14. "10. When, therefore, counsel were notified that trial had been fixed for September 21, 1948, they conferred with Honorable Charles L. Guerin, to whom the case had been assigned for trial, and Colbert C. McClain, Esquire, the Assistant District Attorney in charge. This conference occurred pre-trial, and the foregoing facts were revealed and counsel's and Relator's predicament was made known.

11. At such conference, counsel for Relator also mentioned their desire to have the trial court allow a petition to subpoena the records of the Brooklyn State Hospital, since they were material to the issue of Relator's sanity.

12. To preclude further delay, and it being agreed by the conferees that under Pennsylvania law, court-appointed counsel could not be provided with psychiatric examination and advice, it was further agreed between counsel, the District Attorney and the court that the plea be changed to 'Guilty', that the Commonwealth present its testimony on September 21st before a court en banc, that the case be then postponed sufficiently to allow counsel to subpoena the New York records, and that if these records, when introduced in evidence, raised an issue or doubt of Relator's sanity, the court would consider withdrawal of the plea of 'Guilty.'

13. Thereupon, Relator's plea was changed to 'Guilty' on September 21, 1948."

This cannot be so. The governing Pennsylvania statute in cases of murder is the Act of June 24, 1939, P. L. 872, Section 701, 18 P. S. 4701 (Supplemental Appendix to Brief for Appellant, p. 54a). After dividing murder into degrees and providing for power in the jury to fix the degree of murder, the statute continues "If such person is convicted by confession, the court shall proceed by examination of witnesses to determine the degree of the crime, and, give sentence accordingly." The statute also provides "In cases of pleas of guilty, the court, after it determines the crime to be murder of the first degree, shall, at its discretion, impose sentence of death or imprisonment for life." This constitutes the full function of a court in hearing a guilty plea. It has no right whatever to adjudge the defendant innocent, although it does have the undoubted right, in its discretion, to direct that the plea be withdrawn. But it has no power to judge "criminal responsibility" or "mental capacity to be tried." It did not have that power at common law and it has not been given it by statute. Indeed, the very idea of accepting a guilty plea and then deciding these questions is absurd.

The situation was dealt with in *Commonwealth v. Scovern*, 292 Pa. 26, where the Court said:

> "A person who, by reason of his insanity, is unable to comprehend his position and to make a rational defense cannot be tried on a criminal charge while in that condition. There must be reasonable grounds on which to base an inquiry as to insanity, and a method of ascertaining the fact. At common law, when the question of defendant's sanity at the time of trial was raised in any case, the preliminary question was for the trial judge within his legal discretion; the court, believing doubt exists, may order the fact to be tried *by a special jury impaneled for that purpose, or by the jury which is to try the indictment:* Webber v. Com., 119 Pa. 223." (Emphasis supplied.)

The State Supreme Court then considered various statutory provisions, including those that have been referred to in the present case. But, neither in this case nor in any other has the State Supreme Court said what the majority opinion below says, i. e., that a court en banc, organized to hear a guilty plea, has power to decide insanity. The trial Court was without authority to accept such a conditional guilty plea.

The Trial Court Adjudicated the Degree of Petitioner's Crime to be Murder of the First Degree After Hearing the Prosecution's Evidence Only and Refused to Hear His Evidence on That Question.

Nothing is better established than the common-law proposition that "He who decides anything, one party being unheard, though he should decide right, does wrong." 6 Co. 52; 4 Bl. Com. 483. Cf. *Snyder v. Massachusetts*, 291 U. S. 97, 116.

The majority opinion does not appreciate the reach of petitioner's point that his guilt of murder in the first degree was prematurely adjudicated. He contends not only that such adjudication was premature in that it was arrived at prior to hearing evidence on the question of his sanity but also it prevented consideration of his own testimony as to the merits of the case and the testimony of his other witnesses. He was expressly precluded from presenting any evidence *on the degree of his guilt* as well as his mental competency and was restricted only to the presentation of evidence as it might affect the kind of sentence to be imposed (Petition for Habeas Corpus, par. 33, R. 10; see also R. 76).

The plea of guilty admits guilt of murder in the second degree. *Commonwealth v. Iacobino*, 319 Pa. 65, 178 A. 823. If the Commonwealth seeks a judgment of a higher degree it must produce evidence which convinces the court as a matter of fact, beyond a reasonable doubt, that the crime

was murder of the first degree. Unless the judges are so convinced by the evidence then it is their duty to give judgment no higher than that of murder in the second degree.

The Commonwealth may raise the crime from second degree to first by showing either a wilful, deliberate, premeditated killing or a murder committed in the perpetration of one of the felonies named in the statute, such as robbery. (The Statute appears in full at Supplemental Appendix to Brief for Appellant, 54a.) The defendant's "confession" to the police admitted his purpose was to commit robbery (60a-63a). Hence the court could have found that it was murder in the first degree, provided it believed the "confession" was a voluntary statement from a man who was mentally competent to make it. It had made no inquiry on that point.

But whether petitioner was sane or insane and whatever the evidence was the Court had no right to come to any conclusion prior to hearing him or any evidence he was to produce. *Commonwealth v. Barrish*, 297 Pa. 160; 146 A. 553. It had no right to do this not only because it is the law but because such a specific agreement had been entered into between counsel and court. As a matter of fact, under all the evidence, it is a fair inference that there was no robbery motive at all. There was in fact no robbery or even an attempt unless the shooting itself were to be considered an overt act of robbery. The only evidence on this score is the confession of this petitioner. And the police admitted that there may have been many questions and answers not incorporated in the "confession" (66a).

Therefore, when the Commonwealth's evidence had been fully produced, it was still necessarily open as a question of fact whether the crime was murder of the second degree or murder of the first degree. The Commonwealth's evidence did not compel belief as a matter of law. That is the firmly established rule as to all oral testimony. *Nanty-Glo Boro v. American Surety Co.*, 309 Pa. 236; *Reel v. Elder*, 62 Pa. 308.

The dissenting opinion at p. 28 (192 F. 2d at 556) demonstrates by reference to the official records of this case that there can be no doubt that petitioner was adjudged guilty of first degree murder on September 21, 1948. These records are: (1) The original entries on the Bill of Indictment; (2) The official docket entries lodged with the Supreme Court of Pennsylvania on the original appeal (p. 2a) which are made up from the Bill of Indictment; (3) The Opinion of the Supreme Court of Pennsylvania on the main appeal (362 Pa. 223 at 223).

In addition to these the official record shows (76a) that the court on September 21, 1948, precluded the taking of any further testimony except in mitigation of sentence (76a). Here is what the court said:

> "After Recess.
>
> Judge Guerin: Gentlemen, we have taken the matter under consideration. We feel that there is but one announcement to be made at this time. The order requested in the petition will be made and the return day fixed for Wednesday, October 27th. In the meantime it will be understood that a written statement of the defendant's position will be embodied in the record stating that the purpose of the medical testimony sought to be secured from New York is simply in mitigation of the penalty, *and also any other testimony that may be offered by the defendant,* and have the statement signed by the defendant and by counsel.
>
> The case is continued to Wednesday, October 27, 1948, in This Room, at 10:00 o'clock A. M." (Emphasis supplied.)

The State Supreme Court treated the claim of petitioner as though it applied only to mental capacity and even then answered it only by circular reasoning. It conceded that the question whether he had been adjudged guilty of murder in the first degree on September 21, 1948 or on

February 4, 1949 is a fact in dispute (Supplemental Appendix for Appellant, p. 62, 364 Pa. at 96). But, said the Supreme Court, that issue is immaterial because the plea of guilty admitted petitioner's sanity and therefore no inquiry need be made into that question.

It held specifically that all evidence received thereafter as to mental capacity was so received only on the question of the kind of sentence to be imposed. Here is what the court said (Supplemental Appendix for Appellant, p. 46, 364 Pa. at 112):

> "When counsel for the relator entered a plea of guilty to the indictment, that plea admitted the prisoner's sanity because no insane person can be guilty of murder. The testimony relating to Smith's mental condition, taken after the plea had been entered, was for the purpose of providing the court with data which it could use in determining the appropriate penalty to be imposed upon the defendant."

Clearly it appears, therefore, that the State Supreme Court having conceded that no inquiry was made as to sanity prior to acceptance of the plea of guilty and no evidence for that purpose was received thereafter was holding that no such finding was necessary at all.

But the court below proceeded upon an entirely different basis. With respect to the right to have a hearing on the question of mental capacity the court said (Opinion, p. 7, 192 F. 2d at 545):

> "Due process does not go so far as to require a hearing on mental condition in any particular manner or at any particular stage in the proceedings. Certainly it does not require a hearing in limine on the question as counsel for relator contend. The most that it requires, in our view, is an opportunity to have adequate hearing on the question before guilt is finally determined."

But, having said this, the majority opinion then says that the trial court actually did hear and dispose of the question. The Opinion says (p. 13, 192 F. 2d at 548):

> "Nevertheless, the question of his *guilt or lack of it* was open in the trial court until the judgment of guilty was entered and penalty fixed. The latter, at least, was not until February 4, 1948." (Emphasis supplied)

The majority also, after quoting part of the testimony, says (Opinion, p. 14, 192 F. 2d at 548):

> "These questions and the excerpts quoted above, together with the agreement under which the guilty plea was accepted, make it clear to us, without need of further evidence, that *the questions of guilt and ability to stand trial* were still open during the receipt of defendant's evidence relative to mental condition. The principal purpose of the evidence may have been to aid the court in determining penalty, but it was obviously considered on the merits of the *whole case* as well. A reading of the unpublished opinion of the trial court substantiates our conclusion.[15] It discloses that the court determined that Smith was sane both when he killed the cab driver and when he was tried." (Emphasis supplied)

It is submitted that the respective bases upon which the State Supreme Court and the majority below justify the action of the trial court are irreconcilable. The State Supreme Court holds that neither the question of sanity nor

---

15. As a matter of fact, Petitioner submits that the opinion of the trial court (Appendix to Appellees' Brief, Exhibit 1) shows that the court considered this evidence simply on the question of sentence and indeed demonstrated also that it applied data which has no relevancy whatever to the problem of mental capacity to plead at the time he did so. The court said (p. 10): "We are strengthened in our belief that defendant was fully aware of the nature of his act by the opinion of Dr. Drayton that he now shows no evidence of psychosis, nor was he psychotic when he shot Haines, but was capable of distinguishing between right and wrong, and of understanding what he was doing." Knowledge of the distinction between right and wrong has nothing to do with capacity to plead or cooperate with counsel.

of guilt was open after the plea of guilty. The court below holds that both were. The State Supreme Court holds that the medical evidence subsequent to guilty plea was considered only on sentence, but the majority below say that this is not so.

One thing is clear. Everybody agrees that the question of petitioner's mental capacity was not decided *before* the guilty plea. If the State Supreme Court was correct that no evidence on the point was received thereafter, then the majority of the court below, applying its own view of federal due process, would have to hold that petitioner's rights were violated. To reach its conclusion, therefore, the majority had to, and did, refuse to accept the State Supreme Court's version of what the *state* trial court did. It is submitted that it is not free to do that. Had the majority accepted the State Supreme Court's view of state action and applied its own view of federal due process it would have been forced to agree with the dissenting judges that petitioner was denied due process.

It is submitted further that the reasoning upon which the majority proceeded cannot be sustained. It cannot be true in any criminal case that a man's "guilt or lack of it" or his "whole case" is open after a plea of guilty is accepted. After such acceptance in a murder case only the degree of guilt and the nature of punishment is open, and, as has been demonstrated, in this case the question of the degree of petitioner's guilt was foreclosed prematurely on September 21, 1948 before any of his evidence was heard. At the very least, as the State Supreme Court said, this was a fact "in dispute". Even its materiality was disputed between the two courts. That is one of the reasons why there should be findings of fact.

The majority also says (p. 9) "A hearing was had September 21, 1948, in which the Commonwealth's evidence was introduced, it being agreed that further hearings would be had at which defendant could produce his evidence."

This sentence may mislead. It permits the inference that such an agreement was made on September 21, 1948.

Prior to September 21, 1948, it was agreed that the plea of Not Guilty would be withdrawn and a plea of Guilty entered and that on September 21, 1948, only the evidence of the Commonwealth was to be heard. But on September 21, 1948, contrary to the agreement, the court ordered that no testimony thereafter of any kind whatever would be considered except on the question of penalty. This though the defendant himself had not yet testified nor had it come time for him to testify (R. 76a).

When petitioner took the stand on November 5, 1948, this record demonstrates his incapacity to complete his testimony. A mere reading of the proceedings on that day is enough to capture the spirit in which this case was conducted (166a-190a).[16]

When it was obvious that petitioner could not testify the court made the virtually unprecedented ruling that counsel could tell his story for him while he held his hand on the Bible (185a). Counsel did tell the story for him and in effect contradicted that there was any such robbery. This was entitled to be considered not merely on the issue of penalty but also on the issue of guilt of murder in the first degree. But it could not be so considered because the court had already decided that it was murder in the first degree.

Furthermore, some of the testimony of petitioner's witnesses well might have affected the decision of the court on the degree of the offense.

In fact, the evidence with regard to petitioner's mental history had obvious bearing on the issue of whether he could form the specific intent to rob or the specific intent

16. The trial court says in its opinion (p. 4, Appendix to Appellees' Brief, Exhibit 1): "Defendant took the witness stand and answered a number of questions put to him by his counsel concerning his childhood and his period of service in the army, but when questioned about the events of the night before, and the morning Haines was shot, he remained silent, despite the repeated efforts of his counsel and the several members of the court to elicit a reply. Defendant constantly kept his chin on his chest, twisted his mouth, wet his lips, clenched and unclenched his hands and squirmed about on the witness chair. So pronounced was his conduct that the court requested Dr. Drayton to sit in front of the court room and observe the defendant. The court permitted counsel for defendant to state the result of their investigations and interviews with defendant."

to kill, one of which had to be found in order to support a finding of first degree murder. Together with the other evidence it warranted a finding that petitioner's "confession" was unworthy of belief for the reason that petitioner was mentally incompetent to give an accurate statement. Thus Mildred Wheeler testified as to petitioner's condition before the occurrence, that he appeared to be dopey and appeared to her as though he had been smoking marihuana (192a); his mother, Elsie Easton, testified that she had seen her son, the petitioner, in the same condition as he appeared in the courtroom on previous occasions (i. e., his "exhibitionism") (198a); Margaret Smith, a sister of petitioner, testified that not only was he an habitual drunkard but that he smoked reefers (marihuana) (205a).

With the robbery motive absent it would have been incumbent upon the court to have found that the murder was wilful, deliberate and premeditated else it could not have been said to have been murder in the first degree. Apparently no such finding was made but the adjudication of first degree murder was based only upon the finding that the killing occurred while defendant was perpetrating a robbery. Petitioner was therefore deprived of one of the most fundamental of all his rights—the right not to be condemned until his evidence was received and carefully considered.

It is of no consequence that after September 21, 1948, when the court foreclosed further inquiry as to the degree of the offense, petitioner may not have in fact produced important evidence other than that noted above which would go to the degree. Indeed, it is not invalid to presume that no attempt was made to do so because of the very fact that the court had foreclosed such inquiry.

The majority assumes that the only issue raised was whether or not the plea of guilty should have been permitted to be withdrawn. That entirely misses the issue. Even on that point the court says "There is no indication that any such motion or suggestion was ever made on be-

half of the prisoner." This flies in the face of the record.

He specifically averred (Par. 26 (d) of the Petition) that the testimony on the first petition in the District Court established "The trial court refused to permit Relator to withdraw his plea of 'Guilty' so that he could have the issue of his sanity determined."

And in Par. 32 it was specifically averred:

> "It is averred that the trial court committed substantive error, in derogation of Relator's rights under the due process clause of the 14th Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution, when it permitted the plea of 'Guilty' to bind the Relator and gave judgment thereon, and failed to order said plea to be withdrawn, so that the issue of his sanity could be determined."

Curiously enough the majority quotes from the record as though one of the Judges was urging that the plea of guilty be withdrawn, or at least was affording an opportunity for so doing, and that counsel for petitioner was refusing it. Precisely the opposite is the fact. Properly read it is seen that it was counsel for petitioner who was urging that there was a real issue as to his mental competency which should be decided not informally but formally. Any other conclusion makes the situation ridiculous because it would indicate that the same Mr. Levin who had filed petitions for lunacy commissions, had asked for the appointment of a psychiatrist and had attempted to get the medical records from New York was attempting now to convince the court that the plea of guilty was proper and the court was taking the position that it was not. For Judge Guerin, in response to Mr. Levin's question quoted by the majority "Does that satisfy any uncertainty which your Honors may have had in regard to the withdrawal of the plea? said "It does not to my idea." "Mr. Levin: I think it raises an issue, sir. Judge Sloane: I am certainly of the opinion now he was sane and lucid in October of 1945." If

this means that Mr. Levin was taking the position that the plea of guilty was properly entered it would indicate that Judge Guerin, before whom it was entered, was taking the position that it was not properly entered. Certainly, if that view of the case is correct, it was the duty of Judge Guerin to insist upon its withdrawal.

The majority again repeats the error of saying that at the last hearing, when the testimony of Dr. Drayton, the psychiatrist was received, "the questions of guilt and ability to stand trial were still open during the receipt of defendant's evidence relative to mental condition." Not even the State Supreme Court agreed with this.

The majority then says that since Smith was found to be sane when he killed the cab driver "That being so the only conclusion possible for the court to draw was guilt of first degree murder." That is not so at all. It could not draw such a conclusion unless it believed his confession. It could not believe that confession unless it found that he was mentally competent to make it. And in any event, it could not come to that conclusion on September 21, 1948, after it had heard only one side of the case.

Even a casual study of the photostat attached to the Dissenting Opinion below shows the limit to which someone was willing to go to have this judgment not disturbed. The false entry on that indictment will itself be an indictment of Pennsylvania criminal justice as long as the Federal Reporter is read (192 F. 2d at 569). Who did it? When? Why? One should think that the Commonwealth would clamor for a hearing instead of trying to prevent one.

The Trial Court Did Not Adjudicate Mental Competency or Receive Relevant Evidence on That Issue.

Petitioner pleaded Not Guilty on February 25, 1948. He has argued above that thereafter he lost the valuable right to have his mental competency (to plead or to be tried) determined by a jury trial and was denied all other

pre-trial statutory procedures whereby the question could be determined. On September 21, 1948 he pleaded Guilty.

The majority opinion of the court below holds that it was necessary to due process that the trial court decide the question of mental competency prior to judgment. The opinion then says that this question *was* decided prior to judgment. It is submitted that the following proposition stated in the dissenting opinion cannot be gainsaid (p. 44, 192 F. 2d at 564): "An essential underlying principle is that if a court proceeds to an inquiry as to whether an accused is sane or insane and reaches a judgment in that inquiry, it must do so on sufficient probative data".

As the dissenting opinion points out, ordinarily the question whether a court proceeded to judgment upon sufficient evidence raises only a question of legal error not within the reach of habeas corpus. If the question is whether a plaintiff shall recover, recovery may be granted only upon sufficient probative data. But even if a mistake is made, the result is mere error. But where the question is jurisdictional and depends upon a fact, and the court proceeds to decide that essential question of fact without sufficient relevant data, the result is not mere error.

Here, if petitioner was insane in the sense that he did not have the mental capacity to plead, then the court had no jurisdiction to hear his case. Therefore, if the court decided that jurisdictional fact upon completely irrelevant and non-probative data there was no legal adjudication of a fact upon which jurisdiction depended.

The majority opinion holds that Dr. Drayton's examination and testimony on November 5, 1948 fulfilled the requirement of due process. The data which is relevant to the question whether petitioner could plead or be tried was whether he could rationally advise with his counsel and assist in his own defense. *Commonwealth v. Scovern*, 292 Pa. 26, 29. That inquiry was not made by Dr. Drayton. No question was asked or answered which went to that crucial

issue. The whole of Dr. Drayton's testimony on direct examination is printed in the margin.[17]

The only direct inquiry made of Dr. Drayton as to the formula applied by the trial court occurred in the questioning of one of the judges.

"By JUDGE CARROLL:

Q. In your professional opinion was this man, on January 15, 1948,[18] capable of distingishing between right and wrong?

A. I believe he was.

Q. Was he capable of understanding what he was doing on his own part?

A. I believe so.

Q. As of this date is this man capable of distinguishing between right and wrong in your opinion?

A. I believe he is."

Thus it is seen that the proper legal test was not applied at all. As the dissenting opinion so beautifully states, the so-called M'Naghten formula, i.e., the right and wrong test,

---

17. "A. This man is of average mentality. He has a history of mental illness, diagnosed schizophrenia, catatonic type, for which he was treated at Kings County Hospital on May 16, 1945, to June 12, 1945, discharged recovered October 11, 1945. Also at the Philadelphia General Hospital psychopathic ward, from December 27, 1945, to January 4, 1946. Diagnosis: Alcoholic hallucinosis. Smith had been drinking heavily, said that he felt an urge to kill and asked the polce to take him to the Naval Hospital. He was not admitted there but was sent to the Philadelphia General Hospital. I read his confession to him. He says that he does not remember anything about it, does not remember stealing an automobile in New York but does remember being in the Kings County Hospital. He does not remember being in a Reformatory in New Jersey.

The guard in number four block at the Holmesburg Prison told me, over the telephone, that he acts in a normal manner, is pleasant and cooperative. Smith has a convenient memory loss. He shows no evidence of having any psychosis at this time, nor do I believe that he was psychotic when he shot and killed John J. Haines."

I asked him if he had been smoking reefers and he says, 'I always smoke them.' I said, 'Did you smoke them before you committed the crime' and he said, 'I always smoke them but don't remember committing the crime.' He didn't remember making a confession. He appeared to have a very convenient memory loss. He has no psychosis.

Q. What is your diagnosis?

A. He is of average intelligence, no psychosis; psychotically and neurologically negative."

18. The date the petitioner killed the cab driver.

ought not now to be applied even to the question of criminal responsibility. But, it never had and certainly does not now have any relevancy or probative value to the question of mental competency to plead which confronted the trial court.

It seems clear, therefore, that the majority opinion below was in error in saying that the trial court adjudicated petitioner's mental capacity. Not only did it not have "sufficient probative data," it had none at all. This being so it never determined a question of fact upon which jurisdiction of this petitioner depended. Its judgment of sentence is therefore a nullity.

The Supreme Court of Pennsylvania Not Only Failed to Correct the Denial of Procedural Due Process by the Trial Court in the Main Trial, But Itself Denied Procedural Due Process in This Proceeding. It Did Not Adjudicate Petitioner's Claim of Deprivation of Federal Rights.

An adjudication involves the exercise of judicial power through a hearing upon an issue, the receiving and weighing of evidence and the act of rendering a judgment. *Chase-Hibbard M. Co. v. City of New York,* 64 N. Y. S. 681, 31 Misc. 559, 560; *State v. Huhn,* 346 Mo. 695, 700, 142 S. W. 2d 1064, 1066; *Genzer v. Fillips,* 134 S. W. 2d 730, 732.

Although the Supreme Court of Pennsylvania wrote a lengthy opinion it rejected petitioner's averments of fact without giving him an opportunity to prove them. There was no "hearing upon an issue". There was no "receiving of evidence". There was no "weighing of evidence". This could be justified only if the petition was improper from a procedural viewpoint or was not sufficient on its face to prove violation of Federal rights.

Petitioner filed an original petition for a writ of *habeas corpus ad subjiciendum* in the Supreme Court of Pennsylvania. Constitution of Pennsylvania, Art. V, sec. 3; *Williamson v. Lewis,* 39 Pa. 9; *Commonwealth v. Heston,* 292

Pa. 63, 140 A. 533. This is an appropriate proceeding under Pennsylvania law to test questions of the type presented. *Commonwealth ex rel. Milewski v. Ashe*, 362 Pa. 48, 66 A. 2d 281; *Commonwealth ex rel. Townsend v. Burke*, 361 Pa. 35, 63 A. 2d 77; *Commonwealth ex rel. Piccirelli v. Smith*, 150 Pa. Super. 105. The averments of that sworn petition, if true, showed that the trial Court, by violating the fundamental federal rights of Petitioner, during its proceedings *lost* its jurisdiction to proceed to judgment. *Bowen v. Johnston*, 306 U. S. 19, 23, 24, 59 S. Ct. 442.

The Pennsylvania Supreme Court itself judicially determined not only that the petition was procedurally correct but that it stated a prima facie case. It did this by granting a rule upon the Commonwealth to show cause why the writ should not be granted (R. 13). This practice is a permissble alternative to the immediate issuance of the Writ itself. *Commonwealth ex rel. McGlynn v. Smith*, 344 Pa. 41, 24 A. 2d 1; see also *Walker v. Johnston*, 312 U. S. 275, 61 S. Ct. 574.

Had it not so determined, it would have dismissed the petition without even granting the rule. See *Commonwealth ex rel. McGlynn v. Smith*, 344 Pa. 41, 47, 24 A. 2d 1; *Commonwealth ex rel. Milewski v. Ashe*, 362 Pa. 48, 50, 66 A. 2d 281. Since, therefore, the facts, if true, warranted relief, it is submitted that petitioner was, as a matter of right, entitled to an opportunity to prove that they were true.

The Supreme Court of Pennsylvania denied that opportunity to petitioner. See *Pyle v. Kansas*, 317 U. S. 213, 216, 63 S. Ct. 177; *Cochran v. Kansas*, 316 U. S. 255, 62 S. Ct. 1068; *Rice v. Olson*, 324 U. S. 786, 65 S. Ct. 989. It held no hearing whatever nor did it refer the case to any tribunal to take testimony. No facts were found nor legal argument had on any agreed state of facts.

Instead, the court assumed the *untruth* of some of the crucial allegations and disposed of the whole question on matters which were not of record. The court says in a

footnote to its Opinion (364 Pa. 93, 96, fn. #2): "Habeas Corpus proceedings in behalf of Smith were begun in the United States District Court at Philadelphia, and on October 4, 1949, testimony was taken there. With the acquiescence, at Bar, of the respective Counsel, this testimony was made a part of the record of the proceeding here". This is simply not so. This statement is made without any basis whatever, either of fact or law. A habeas corpus petition *was* filed in the United States District Court and testimony was taken in that Court, but the record of this case in the Pennsylvania Supreme Court not only does not show any "acquiescence" of Counsel that such testimony be made a part of this record, but, on the contrary, conclusively demonstrates the opposite.

The record shows that petitioner's counsel at the very beginning called the attention of the Supreme Court of Pennsylvania to the fact that it would be improper to dispose of the case upon petition and answer (R. 55-57). Both orally at Bar and in a brief filed contemporaneously with oral argument, he stated his objection to proceed in that fashion (R. 55-57). Some time thereafter, but prior to decision, petitioner's counsel filed a brief of law with the court and again called to the attention of the court the necessity of a hearing before a member of that court or that the matter be sent back for hearing before one of the judges of the lower state court (R. 56, 57).

The next thing that happened was that the Supreme Court filed an Opinion, refusing the petition for writ of habeas corpus without having held any hearing before any member of that court, or, indeed, any hearing before any judge or even on depositions. In that Opinion, as originally filed, the Court, speaking of the testimony previously taken in the United States District Court, recited that "by agreement, this testimony was made a part of the record of the proceeding here" (R. 54).

Upon receipt of a copy of that Opinion, counsel who had orally argued the matter before the Supreme Court of

Pennsylvania, filed his sworn petition for reargument, stating unequivocally that this statement of the Opinion was untrue and unsupported by the record or the facts (R. 54). The Commonwealth filed no answer whatever. It has never denied the averments of this petition for rehearing. Not even in the present proceeding were those averments contradicted by anybody.

Thereupon the Supreme Court simply changed the language of footnote 2, which in the original Opinion indicated that the court considered the testimony given in the District Court "by agreement of Counsel" to "by acquiescence of Counsel" (364 Pa. 93, 96, fn. #2).

It is submitted that Counsel for the absent petitioner would not and could not bind him by any such action. Counsel properly could not have "agreed" much less "acquiesced" that conflicting testimony taken in a Federal Court be made the basis for decision by a State Appellate Court on an issue of life or death where none of the Justices of the Appellate Court ever saw or heard the witnesses and where no procedure was used whereby findings of fact on disputed testimony could be made by any Pennsylvania tribunal. Petitioner was not even in Court (R. 13).

The State Supreme Court, speaking of the proceeding in the United States District Court, says (364 Pa. 93); "In that hearing these facts were brought out * * *" but there was no finding of facts by the District Court en banc. The judge who heard the testimony held that petitioner was badly overreached. See dissenting opinion 87 F. Supp. 339. The other members of the District Court on the original petition never reached the merits and disposed of the petition on territorial jurisdictional grounds. Even the Supreme Court of Pennsylvania did not make findings of fact. The above quotation shows that this is so, and besides there was no way for the justices of that court to make findings of fact. There was much testimony and many issues raised by that testimony in the District Court to which the Opinion of the Supreme Court does not even

refer. The Opinion simply picks and chooses from that testimony certain bits of evidence which it quotes as comporting with its ultimate conclusion. If that whole testimony *were* part of this record, a fair reading of it would support petitioner's contentions.

Such "acquiescence" could not confer upon the Pennsylvania Supreme Court jurisdiction to act upon conflicting testimony taken in a court of a foreign jurisdiction, particularly where such foreign court held itself to be without even territorial jurisdiction.

Petitioner's brief as to the facts he expected to be able to prove, which was filed contemporaneously with the oral argument (R. 55) and his brief on questions of law, which was filed thereafter but prior to decision, ought to have eliminated any such question of "acquiescence".[19] Even after the Opinion of the Supreme Court was filed and counsel, upon his oath, challenged the correctness of the statement that he had agreed to have this writ decided without findings of fact upon which the law could have been declared, the court was under a duty to proceed in accordance with law to have the facts determined instead of insisting upon a non-existent "acquiescence".

If this were not enough, surely the Supreme Court of Pennsylvania had to afford a hearing when petitioner, formally of record, challenged on procedural due process grounds the right of the court to deny him one (R. 54 et. seq.).

It is submitted, therefore, that the Supreme Court of Pennsylvania was under the duty to determine the application for the writ in a fundamentally fair way by having the petitioner's allegations found to be true or untrue by some Pennsylvania tribunal in accordance with law. Not only, therefore, did the Supreme Court of Pennsylvania fail to redress the denial of due process which occurred in the

---

19. These briefs as to these matters are of "Record" by the petition for re-hearing (R. 54).

lower Pennsylvania Court, but it too denied procedural due process to this petitioner. It "adjudicated" nothing.

The majority opinion of the court below holds that since the testimony taken in the District Court was "referred" to in the petition for the writ "it can hardly be lack of due process for the Supreme Court to refer to the testimony when the relator himself did so." First of all, petitioner referred to that testimony to show that there was substance behind his allegations, that is to urge the Supreme Court of Pennsylvania to grant him a hearing. Secondly, the mere reference to that testimony and conclusions drawn from it certainly does not authorize the Supreme Court of Pennsylvania to procure, in a way still unknown to petitioner's counsel, one copy of that testimony and proceed to pick and choose from it and to base conclusions upon it. Referring to it is one thing but for an opinion writer to misconstrue it and treat it as having established "facts" which are utterly at variance with the petition is quite another.

Lastly, on this point, counsel for petitioner never knew that the court had that record or was considering it. He never had an opportunity to argue it orally or to brief it. The record shows by his uncontradicted affidavit that it came as a surprise to him when the court's opinion showed that it had possession of a copy of it. Had he known that he would have been able to register additional objection before decision or if necessary to argue on the basis of that testimony. Due process requires fair opportunity to argue both law and facts and to know what data is being considered. Petitioner was overreached by the Supreme Court of Pennsylvania.

The District Court Should Have Heard the Petition.

Since the state court did not permit petitioner to prove his averments both courts below are duty bound to accept as true all his well pleaded allegations and to examine for themselves whether under the facts stated petitioner is

entitled to a hearing on the claimed violations of the due process clause. *Hawk v. Olson*, 326 U. S. 271, 273; *Lisenba v. California*, 314 U. S. 219, 237; *White v. Ragen*, 324 U. S. 760.

Habeas corpus is a proper proceeding in a federal court to test whether a state has violated the Federal Constitution even if the events alleged to constitute infringement had not appeared upon the face of the record of the conviction. *Frank v. Mangum*, 237 U. S. 309, 331; *Hawk v. Olson*, 326 U. S. 271, 274.

In *Hawk v. Olson*, 326 U. S. 271, this Court said "Petitioner carries the burden in a collateral attack on a judgment. He must prove his allegations but he is entitled to an opportunity."

It was the presiding justice of the Third Circuit whence this case comes who said in dissent in *Louisiana v. Resweber*, 329 U. S. 459, 472 "Where life is to be taken, there must be no avoidable error of law or uncertainty of fact."

The judge who received this petition granted a rule to show cause why it should not be granted but then all the judges of the District Court assembled *sua sponte* to hear the case. Petitioner now, even if belatedly, questions the power of the District Court judges to do this.[20]

Petitioner's counsel made no objection at the time or even when the case was argued in the Court of Appeals.[21] However, he makes it now on the ground that if the District Court has no authority to assemble en banc to decide a petition for writ of habeas corpus his consent, whether by waiver or otherwise, cannot confer such power upon them.

---

20. The judge who heard the evidence originally wrote a dissenting opinion in which he agreed with Petitioner's contention, on the second petition he granted the rule and again dissented.

21. Petitioner, of course, does not challenge the right of the court of Appeals to assemble the full court to hear the appeal.

Conclusion.

Petitioner is asking for certiorari to review the denial of his asserted right to have a hearing and decision by some court some time before he dies on the question whether the State of Pennsylvania condemned him to death and proposes to execute him in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

No court, state or federal, has adjudicated his claim in the sense that it has found the facts and tested those facts by applying the standards required by the Fourteenth Amendment. At every turn of the road Pennsylvania has successfully prevented an adjudication of the facts.

The seven judges of the District Court for the Eastern District of Pennsylvania thought the questions involved were so important that they heard them en banc. The majority of four held that the court had the right to exercise discretion and then proceeded to exercise it against petitioner. The minority of three believed that the petition presented a prima facie case, that the record was not clear that Pennsylvania had ever adjudicated that case on its merits and that it was the duty of the federal court to do so.

On appeal the Court of Appeals thought the issues to be of such paramount importance that the Court, of its own motion, assembled en banc. The result numerically was a repetition of what happened in the District Court but upon different reasoning. The majority four judges disagreed with the District Court on its right to exercise discretion but affirmed the decision on the ground that it was right as a matter of law. The minority of three judges agreed that the District Court was without discretion but held that the Petition and all relevant records which the Court was entitled to consider demonstrated that in six separate and distinct ways Pennsylvania had violated petitioner's federal right to due process of law.

Presently the posture of this case is that petitioner has exhausted all state remedies and the questions for decision are whether on the data which the Court is legally entitled to consider he is of right entitled to an adjudication on the merits, including findings of fact and decision by a federal court on his claim of violation of federal rights.

Respectfully submitted,

HERBERT S. LEVIN,
THOMAS D. MCBRIDE,
Attorneys for Petitioner.